TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 128.

CHARLES E. ANTHONY, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF JASPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED APRIL 2, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 128.

CHARLES E. ANTHONY, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF JASPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	2	1
Petition	5	2
Summons	8	3
Marshal's return on same	9	4
Answer of defendant	9	4
Replication	14	6
Leave to amend answer	16	7
Jury waiver	16	7
Amended answer	16	8
Stipulation to file additional counts to petition	23	10
Replication to amended answer	24	11
Application by defendant for a continuance	26	12
Stipulation as to answer and proof	28	13
Additional counts to petition	29	13
Case submitted	31	14
Demurrer to defendant's evidence	31	14
Order to file additional briefs	32	14
Submission set aside	32	14
Case resubmitted	33	15
Judgment for defendant	33	15
Special finding	34	15
Copy of bond	34	16
Copy of coupon	36	16
Conclusion of law	44	19
Opinion of the court	44	19
Writ of error and citation allowed, &c	48	21
Motion to set aside order for writ of error	49	21
Retraxit of writ of error	50	22

	Original.	Print.
Motion to set aside judgment	50	22
Same overruled by the court	51	22
Plaintiff excepts to judgment, &c	52	53
Appeal bond approved	52	23
Writ of error and citation allowed, &c	52	33
Copy of appeal bond	53	23
Stipulation to omit counts in transcript	55	24
Clerk's certificate	57	24

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of *of* Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1876, thereof, between Charles E. Anthony, plaintiff, and the County of Jasper, in the State of Missouri, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23rd day of November, in the year of our Lord one thousand eight hundred and seventy-six.

Issued at office in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, dated as aforesaid.

[SEAL.] H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri,
By HENRY NITCHY, *D. C.*

Allowed by—

ARNOLD KREKEL,
Judge.

2 *Return to writ.*

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at the city of Jefferson, this fifteenth day of March, A. D. 1877.

[SEAL.] H. C. GEISBERG, *Clerk.*

(Indorsed:) No. 286. United States circuit court, western district of Missouri. C. E. Anthony vs. Jasper County. Writ of error to the circuit court of the United States for the west. dist. of Missouri.

3 The United States of America to the County of Jasper, in the State of Missouri, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the

second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Missouri, wherein Charles E. Anthony is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Arnold Krekel, judge of the circuit court of the United States for the western district of Missouri, this twenty-third day of November, in the year of our Lord one thousand eight hundred and seventy-six.

ARNOLD KREKEL,
Judge.

4 UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I hereby acknowledge due service of the within citation this sixth day of January, A. D. 1877.

E. J. MONTAGUE,
Attorney for Defendant in Error.

(Indorsed:) United States circuit court, western district of Missouri. C. E. Anthony vs. Jasper County. Citation.

5 UNITED STATES OF AMERICA,
Western District of Missouri, sct:

Pleas before the honorable circuit court of the United States in and for the western district of Missouri, at the November term thereof, A. D. 1874, in case of—

CHARLES E. ANTHONY, PLAINTIFF,
against
THE COUNTY OF JASPER, IN THE STATE OF Missouri, defendant.
} No. 286. Interest on bonds.

Be it remembered that heretofore, to wit, on the 22nd day of June, A. D. 1874, there was filed in the clerk's office of said circuit court a petition, in words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA,
Western District of Missouri:

In the circuit court of the United States for said district. November term, 1874.

CHARLES E. ANTHONY, PLAINTIFF,
vs.
THE COUNTY OF JASPER, DEFENDANT.

Charles E. Anthony, the plaintiff, who is a citizen of the State of Illinois, complains of the County of Jasper, defendant, which is a municipal corporation existing under the laws of the State of Missouri and a citizen thereof.

And for first cause of action the plaintiff states that heretofore, to

wit, on the twenty-eighth day of March, A. D. 1872, the defend-
6 ant by its certain writing obligatory called bond number 1, sealed with its corporate seal and signed by R. S. Mervin, the then presiding justice of the county court of said Jasper County, and A. E. Gregory, the then clerk of said county court, and dated the day and year aforesaid, and now here shown to the court, acknowledged itself indebted and firmly bound to the Memphis, Carthage and Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, which sum the said County of Jasper, for and on account of Marion Township for value received, thereby promised to pay said company or bearer at the National Park Bank, in the city of New York and State of New York, twenty years after date, with interest thereon from the date thereof, at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July of each year on the presentation and delivery at said National Park Bank, in said city of New York, State of New York, of the coupons of interest thereto attached; which said bond and coupons were issued pursuant to an order of the county court of said county of Jasper, made by authority of an act of the general assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said township of Marion as is therein recited.

7 And plaintiff states that by its certain interest coupon number three, herewith filed, detached from said bond and bearing even date therewith, the defendant promised to pay the sum of twenty-five dollars on the first day of July, 1873, being interest on bond number 1, for $500, payable at the said National Park Bank in the city and State of New York, which said promise was for and on behalf of said Marion Township as stated in said bond; that the plaintiff is the owner, holder and bearer of said interest coupon, and the same is due and remains unpaid.

And for another and 2d cause of action, the plaintiff states, &c.

(MEMORANDUM BY CLERK.—Here follow 78 other counts of like effect and tenor as the foregoing, except as to the number of the bond. See stipulation of counsel on page 55.)

Wherefore the plaintiff prays judgment against the defendant for the sum of one thousand nine hundred and seventy-five dollars, the aggregate amount of said seventy-nine coupons for twenty-five dollars each with interest thereon from July 1st, 1873, their date of maturity, with costs, &c.

JOSEPH SHIPPEN,
Plaintiff's Attorney.

8 And thereupon, on said 22d day of June, A. D. 1874, there was issued out of said clerk's office a summons, in words and figures following, to wit:

Summons.

WESTERN DISTRICT OF MISSOURI, *set:*

The President of the United States of America to the marshal of the western district of Missouri, greeting:

You are hereby commanded to summon the County of Jasper, in the State of Missouri, a municipal corporation & a citizen of said district, that it be and appear before the honorable circuit court of the United States for the western district of Missouri, on the first day of the next term thereof, to be holden at the city of Jefferson, in and for said district, on

the 16 of November next, then and there to answer the complaint of Charles E. Anthony, citizen of the State of Illinois, as set forth in the petition filed in said court on the 22d day of June, A. D. eighteen hundred and seventy-four.

Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 2d day of July, A. D. eighteen hundred and seventy-four. Issued at office in the city of Jefferson, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By C. M. WARD, *D. C.*

9 Upon said summons the marshal of the United States for said district made the following return, to wit:

Marshal's return.

I hereby certify that I executed this writ by delivering to A. E. Gregory, county clerk of the county of Jasper, in the western district of Missouri, at his office, in the city of Carthage, county aforesaid, & State of Missouri, a true copy of the within summons, together with a copy of the petition filed in this cause. Done on the 11th day of July, A. D. 1874.

GEO. SMITH,
U. S. Marshal,
By SAM'L O. TENNY,
Deputy.

And afterwards, at a regular stated term of the said circuit court of the United States in and for the western district of Missouri, begun and held at the city of Jefferson, in said district, on the third Monday, being the 16th day of November, A. D. 1874, the following proceedings were had in this case on the 17th day of November, in said last-mentioned year, to wit:

CHARLES E. ANTHONY
vs. } No. 286.
JASPER COUNTY.

Now comes the defendant by E. J. Montague, its attorney, and files answer to the petition herein; which said answer so filed is in the words and figures following, to wit:

Answer.

In United States circuit court, November term, 1874.

UNITED STATES OF AMERICA.
Western District of Missouri:

10 CHARLES E. ANTHONY, PLAINTIFF,
vs.
THE COUNTY OF JASPER, DEFENDANT.

Comes now said defendant and makes answer, viz:

Defendant for answer to first count in plaintiff's petition denies that

on the 28th day of March, A. D. 1872, or at any other time, by its certain writing obligatory, called bond number one, sealed with its corporate seal, and signed by R. S. Mervin, the then presiding justice of the county court of the said county of Jasper, and A E. Gregory, the then clerk of the said county court, and dated the day and year aforesaid, acknowledged itself indebted and firmly bound to the Memphis, Carthage and Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, and says that said allegation is untrue. And defendant says that the said R. S. Merwin was not the presiding justice of the county court of said Jasper County on the 28th day of March, 1872, nor at any time prior thereto, nor at any time thereafter before the 21st day of October, 1872.

Defendant denies that by the said supposed writing obligatory the said Jasper County promised for value received, for and on account of Marion Township, to pay said railroad company, or bearer, twenty years after date, the sum of five hundred dollars, with interest thereon from the date thereof, at the rate of ten per cent. per annum; denies
11 that by the said supposed writing obligatory, or by any interest coupon thereto attached, this defendant promised to pay interest on said supposed writing obligatory on the presentation of said supposed coupons to the National Park Bank, in the city and State of New York, or at any other place.

And defendant denies that said supposed writing obligatory, called bond number one, and said supposed coupon, were issued pursuant to an order of the county court of said Jasper County; denies that the county court of said Jasper County made an order on the 28th day of March, 1872, or at any other time, authorizing the issue of said supposed bond; denies that said supposed bond was issued by authority of an act of the general assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the State of Missouri," approved the 23d day of March, 1868.

And defendant denies that by its certain interest coupon number three detached from said supposed bond number one this defendant promised to pay twenty-five dollars on the 1st day of July, 1873, or at any other time, as interest on said supposed bond number one; denies that by said supposed coupon, by plaintiff specified, this defendant promised for and on behalf of said Marion Township to pay the said sum of twenty-five dollars, as stated in said supposed bond; and defendant denies that plaintiff is the owner, holder, or bearer of
12 said supposed interest coupon.

And further answering, defendant states that the said supposed writing obligatory, called bond number one, is not the bond, writing obligatory, act, deed, or obligation of this defendant, and that said supposed interest coupon number three is not the interest coupon, writing, act, deed, or obligation of this defendant.

And further answering, defendant says that the said defendant is informed and believes that the said pretended bond number one and the said pretended interest coupon detached therefrom were made and issued by R. S. Merwin on or about the 11th day of October, 1872; and defendant avers that the making and issuing of said pretended bond and said pretended coupon was without the knowledge or consent of the county court of said Jasper County; that at the time of the making and issuing of said pretended bond and said pretended coupon, and that at the time the same bear date, the said R. S. Merwin was not the presiding justice of the county court of said Jasper County; and that said R. S. Merwin had no authority whatever for the making and issuing of said

pretended bond and said pretended coupon; that in the making and issuing of said pretended bond and said pretended coupon the said R. S. Merwin falsely and fraudulently pretended to be and act as the presiding justice of said county court, when in truth and in fact John
13 Purcell was at the time of the making and issuing of said pretended bond and said pretended coupon the presiding justice of said county court; and that the making and issuing of said pretended bond and said pretended coupon were accomplished through the fraud, deceit, connivance, and collusion of the said R. S. Merwin with the said Memphis, Carthage and Northwestern Railroad Company.

Defendant, for answer to 2d count in plaintiff's petition, &c.c.

(See stipulation on page 55).

(MEMORANDUM BY CLERK.—Here follow 78 separate answers, the same as the foregoing, one to each count of plaintiff's petition, and alike in every respect, except as to the number of the count and the number of the bond.)

Wherefore defendant prays judgment that plaintiff have nothing by his writ, and that defendant go hence without day, and have judgment for costs of suit.

E. J. MONTAGUE,
Att'y for Defendant.

I, Cornelius Conard, presiding justice of the county court of Jasper County, State of Missouri, first being duly sworn, say, upon my oath, that the statements and facts set forth in the foregoing answer to the several counts in plaintiff's petition are true to the best of my
14 knowledge and belief.

CORNELIUS CONARD.

Sworn to and subscribed before me this 13th day of November, A. D. 1874.

In witness whereof, I, Josiah Lane, clerk of the circuit court of Jasper County, Missouri, have hereunto set my hand and affixed the seal of said office, the day and year last above written.

[SEAL.] JOSIAH LANE, *Clerk.*

And afterwards, at the said last mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 19th day of November, A. D. 1874, to wit:

CHARLES E. ANTHONY } *vs.* JASPER COUNTY. } No. 286.

Now comes the plaintiff by Joseph Shippen, his attorney, and files replication herein; which said replication is in words and figures following, to wit:

Reply.

In the circuit court of the United States for the western district of Missouri, November term, 1874.

CHARLES E. ANTHONY, PLAINTIFF, *vs.* JASPER COUNTY, DEFENDANT. } No. 285.

The plaintiff, for reply to the defendant's answer, states that
15 he has no knowledge or information sufficient to form a belief whether the bonds and coupons named in plaintiff's petition and

defendant's answer were made and issued on or about the 11th day of October, 1872, or at any other time than that stated on the face thereof. And plaintiff denies that the making and issuing of said bonds and coupons were without the knowledge or consent of the county court of Jasper County. And plaintiff avers that at the time of the making and issuing of said bonds and coupons R. S. Merwin was the presiding justice of the county court of said Jasper County, and had full authority for the making and issuing of said bonds and coupons. And plaintiff denies that said R. S. Merwin pretended, either falsely or fraudulently, to be and act as the presiding justice of said county court, and denies that John Purcell was at the time of the making and issuing of said bonds and coupons the presiding justice of said county court; and denies that the making and issuing of said bonds and coupons were accomplished through the fraud, deceit, connivance, or collusion of the said R. S. Merwin with the said Memphis, Carthage and Northwestern Railroad Company. And plaintiff states that he is a bona fide holder of said bonds and coupons for value previous to maturity. And plaintiff prays judgment as asked for by his petition.

JOSEPH SHIPPEN,
Plaintiff's Attorney.

16 And afterwards, at said last mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 25th day of November, A. D. 1874, to wit:

Leave to amend answer.

CHARLES E. ANTHONY
vs. } No. 286.
JASPER COUNTY.

It is ordered by the court that defendant have leave to amend its answer on or before the third day of December, and serve copy on plaintiff's attorney, plaintiff to file replication by the 14th day of December, and cause specially set for trial on the 14th day of December.

A stipulation waiving a jury in this case was filed, and is in words and figures following, to wit:

Jury waiver.

CHARLES E. ANTHONY
vs. } No. 285.
JASPER COUNTY.

And now, November 25, 1874, it is hereby stipulated and agreed that a trial by jury is waived, and that this case may be tried by the court.

JOSEPH SHIPPEN,
Plaintiff's Attorney.
E. J. MONTAGUE,
Att'y for Defendant.

And afterwards, on December 4th, 1874, the defendant filed his amended answer in words and figures following, to wit:

Amended answer.

United States circuit court, western district of Missouri.

CHARLES E. ANTHONY, PL'FF,
vs.
THE COUNTY OF JASPER, DEF'T.

Comes now defendant, and, by leave of the court first had and received, files herein this amended answer, and denies that on the 28th day of March, 1872, or at any other time, defendant, by its certain supposed writing obligatory, called bond number one, alleged to be sealed with its corporate seal and signed by R. S. Merwin, the then supposed presiding justice of the county court of the said county of Jasper, and A. E. Gregory, then clerk of said county court, and dated the day and year aforesaid, that it acknowledged itself indebted and firmly bound to the Memphis, Carthage and Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, and the defendant says that said allegation in plaintiff's petition contained is untrue.

And defendant denies that on the 28th day of March, 1872, or at any other time, this defendant made, executed, or delivered said supposed writing obligatory, called bond number one, by plaintiff in his petition mentioned and described; and denies that by said supposed writing obligatory, called bond number one, this defendant acknowledged itself indebted and firmly bound to the Memphis, Carthage and Northwestern Railroad Company, or bearer, in the sum of five hundred dollars,
18 or any other sum. And defendant states that the said R. S. Merwin was not the presiding justice of the county court of said Jasper County on the 28th day of March, 1872, nor at any time prior thereto, nor at any time thereafter, before the 21st day of October, 1872; defendant denies that by the said supposed writing obligatory the said Jasper County promised, for value received, for and on account of Marion Township, to pay said railroad company, or bearer, twenty years after date, the sum of five hundred dollars, or any other sum, with interest thereon from the date thereof at the rate of ten per centum per annum; denies that by the said supposed writing obligatory, or by any interest coupon thereto attached, this defendant promised to pay interest on said supposed writing obligatory; defendant denies that by said supposed writing obligatory defendant promised to pay interest on the same on the presentation of said supposed coupons to the National Park Bank, in the city and State of New York, or at any other place.

And defendant denies that said supposed writing obligatory, called bond number one, and said supposed coupon were issued pursuant to an order of the county court of said Jasper County; and denies that the county court of said Jasper County made an order on the 28th day of March, 1872, or at any other time, authorizing the making and
19 issue of said supposed bond and coupon; denies said supposed bond and coupon were made and issued by authority of an act of the general assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the State of Missouri," approved the 23d day of March, 1868.

And defendant denies that by its certain interest coupon number three, alleged to be detached from said supposed bond number one, this defendant promised to pay twenty-five dollars on the first day of July, 1873, or at any other time, as interest on said supposed writing obligatory; denies that by said supposed coupon this defendant promised, for and on

behalf of said Marion Township, to pay the sum of twenty-five dollars, as is alleged to be stated in said supposed writing obligatory; and defendant denies that plaintiff is the owner, holder, or bearer of said supposed interest coupon.

And further answering defendant states that said supposed writing obligatory called bond number one is not the bond, writing obligatory, act, deed, or obligation of the defendant, and that said supposed interest coupon number three is not the interest coupon, writing, act, deed, or obligation of this defendant, and that this defendant never made, executed, or delivered the same, nor any one of the said supposed bonds or supposed coupons in the several counts of plaintiff's petition mentioned.

And further answering defendant says that this defendant is
20 informed and believes that the said supposed bond number one, and the several supposed bonds mentioned in the several counts of plaintiff's petition, and the said several so-called interest coupons, alleged to be detached from the said so-called bonds, were made by one R. S. Merwin on or about the 11th day of October, 1872, and defendant avers that the making of said pretended and so-called bonds, and said pretended and so-called coupons, and each and every one of them, in the several counts of plaintiff's petition mentioned, was without the knowledge, consent, or authority of this defendant; and that at the time the said so-called bonds and pretended coupons bear date the said R. S. Merwin was not the presiding justice of the county court of said Jasper County; and that the said R. S. Merwin had no authority whatever for the making of said so-called bond and of said so-called coupon, nor any one of the same, in the several counts of plaintiff's petition mentioned; that in the making of said pretended bonds and pretended coupons in the several counts of plaintiffs mentioned, the said R. S. Merwin falsely and fraudulently pretended to be and act as the presiding justice of the county court of said Jasper County, when in truth and in fact John Purcell was, at the time of the making of the same, as aforesaid, the presiding justice of said county court; and the making of the said
21 so-called and pretended bond and the said so-called and pretended coupon, and each and all of them in plaintiff's petition mentioned, was accomplished through the fraud, deceit, connivance, and collusion of the said R. S. Mervin with the said Memphis, Carthage and Northwestern Railroad Company, and that the same were antedated, and made to bear date on a day long prior to the actual making thereof, by the said R. S. Merwin, as 'foresaid, at the request and solicitation and through the fraud, deceit, connivance, and collusion of the said Memphis, Carthage and Northwestern Railroad Company with the said R. S. Merwin, for the purpose of evading the law and swindling the taxpayers of said Marion Township, and that none of said bonds or coupons thereto attached were ever registered or presented for registration, as required by law, and that neither this defendant nor the said Marion Township has received any consideration for the said so-called bond or the said so-called coupon, or any of them, in the several counts of the plaintiff's petition mentioned.

Wherefore the defendant prays that the plaintiff take nothing by his writ, and that the defendant go hence without day, and have judgment for his costs.

E. J. MONTAGUE,
Attorney for Defendant.

22 STATE OF MISSOURI,
County of Jasper, ss:

I, Cornelius Conard, chairman and presiding justice of the Jasper County court, make oath and say that the matters and facts in the foregoing annexed answer, and as therein stated, are true, to the best of my knowledge and belief.

C. CONARD.

Subscribed and sworn to before me this 3rd day of December, 1874.
[SEAL.] A. E. GREGORY,
Clerk County Court Jasper County, Mo.

And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 14th day of December, A. D. 1874, to wit:

CHARLES E. ANTHONY
vs.
JASPER COUNTY. } No. 286.

Now come the said parties, by their attorneys, the plaintiff by Joseph Shippen and the defendant by E. J. Montague, and file stipulation by which plaintiff has leave to attach additional counts to petition, and thereupon plaintiff files replication, and the defendant files application for a continuance; which being seen and heard, it is ordered by the court that this cause be continued until the first Monday in February next, at cost of defendant; which said stipulation to file addi-
23 tional counts to petition is in words and figures following, to wit:

Stipulation to file add. counts.

In the circuit court of the United States for the western district of Missouri.

CHARLES E. ANTHONY
vs.
JASPER COUNTY. } No. 286.

And now, December 14, 1874, it is hereby agreed by and between the parties to this suit, by their attorneys, as follows: The plaintiff has leave, on or before the first Monday of February, 1875, to file an additional and supplemental petition, embracing new counts, not exceeding three hundred in number, upon other coupons at the said date matured of like character with those hereinbefore filed and sued on, the said new counts being, respectively, in form like those of the original petition except in particulars requisite to the identification of such coupons respectively; and to such additional and supplemental petition the amended answer filed by the defendant December 4th, 1874, shall stand and serve as an answer to each and every count respectively; and to such answer, so standing and serving, the reply filed this day by the plaintiff shall stand and serve as a reply.

JOSEPH SHIPPEN,
Pl'ff's Att'y.
E. J. MONTAGUE,
Def't's Att'y.

24 And which said replication, so filed, is in words and figures following, to wit:

Replication to amended answer.

In the circuit court of the United States for the western district of Missouri, November term, 1874.

CHARLES E. ANTHONY, PLAINTIFF,
vs.
THE COUNTY OF JASPER, DEFENDANT. } No. 286.

Plaintiff, for reply to the defendant's amended answer, denies that the bonds and coupons named in his petition were made on or about the 11th day of October, 1872, and denies that the same were made by R. S. Merwin, without the knowledge, consent, or authority of the defendant; and denies that said Merwin was not the presiding justice of the county court at the time of the making and delivery of the said bonds and coupons, and denies that John Purcell was at said time the presiding justice of said county court; and plaintiff denies that the making of the bonds and coupons named in his petition, or either or any of them, was accomplished through any fraud or any deceit or any connivance or any collusion of the said R. S. Merwin with the Memphis, Carthage and Northwestern Railroad Company, and denies that the same were antedated or made to bear date prior to the actual making thereof by the said R. S. Merwin, and denies that there was any such request or solicitation by the said railroad company, and denies all fraud,
25 deceit, connivance, and collusion of the said railroad company with the said R. S. Merwin for the purpose of evading the law or of swindling the tax payers of Marion Township or for any other purpose; and plaintiff denies that the defendant for and on behalf of said Marion Township has received no consideration for the bonds and coupons in plaintiff's petition mentioned, and on the contrary plaintiff states that the defendant for and on behalf of the said township of Marion subscribed for seventy-five thousand dollars of the capital stock of said Memphis, Carthage and Northwestern Railroad Company, and received the same and thereby became and now still is the holder and owner of five shares of the capital stock of said railroad company for each of the said bonds in plaintiff's petition mentioned, and holds certificates for said shares of stock, and has voted on the same at the corporate meetings of said railroad company. And plaintiff states that the county court of the said county of Jasper has heretofore levied taxes upon the taxable wealth of said Marion Township and proceeded to collect the same for the purpose of paying the interest upon the said bonds. And plaintiff states that he is a bona fide holder and owner of the bonds and coupons mentioned in his petition, having purchased them for
26 valuable consideration previous to maturity of the same or any part thereof, and without notice of any of the irregularities or frauds alleged in defendant's amended answer hereinbefore specifically denied. And having fully answered, the plaintiff prays for judgment as originally asked by his petition.

JOSEPH SHIPPEN,
Plaintiff's Attorney.

And said application for a continuance, filed as aforesaid, is in words and figures following, to wit:

Application for continuance.

In U. S. circuit court, western district.

CHARLES E. ANTHONY, PL'FF,
vs.
THE COUNTY OF JASPER, DEF'T.

Comes now defendant, by E. J. Montague, who says that defendant cannot safely go to trial at this time because of the absence of material witnesses; that on the 27th day of November, 1874, this defendant filed in the office of the clerk of this court interrogatories to the witnesses whose testimony is material in the trial of this cause, instructing the clerk of said court to issue the proper commission to take the depositions of the witnesses to whom interrogatories were addressed at the expiration of ten days after the filing of said interrogatories; that said
27 clerk failed to issue said commission; that in consequence of the failure of the said clerk to issue said commission defendant is deprived of the testimony of two of said witnesses; that after this defendant became aware of the failure of the clerk to issue said commission it was impossible for want of time to have said witnesses subpœn'ed in time to attend this trial. And defendant states that it expects to prove by John Purcell that he was the acting presiding judge of the county court of Jasper County, during the year 1872, until about the 10th day of October, 1872; that he had no knowledge of the issue of said bonds until long after the month of October, 1872; that if the bonds in suit were made prior to the 10th day of October, 1872, they were made without the knowledge or consent of the said Purcell, either as an officer of the court or as an individual; and that said Purcell never consented to the issue of said bonds, so long as he was a member of said county court. And defendant expects to prove by Isaac E. Koontz that he was a member of the county court of Jasper County during the whole of the year 1872; that he never had any knowledge of the issue of the bonds in suit until in the month of December, 1872; that he never consented to the issue of said bonds; that said bonds were issued by R. S. Merwin
28 of his own motion, without the knowledge or consent of the other members of said county court; that said bonds were made on or about the 11th of October, 1872, and that they were antedated by the said Merwin at the instance of L. P. Cunningham, president of the Memphis, Carthage and Northwestern Railroad Company, for the purpose of evading the law which requires all bonds issued by county courts after the 30th day of March, 1872, to be registered with the State auditor before such bonds should have validity or become negotiable, and this affiant says he knows of no other witness whose testimony can be had at this time by whom the same can be proven.

E. J. MONTAGUE.

E. J. Montague, being sworn, says upon his oath that the statements and facts set forth in the foregoing instrument of writing are true to the best of his knowledge and belief.

E. J. MONTAGUE.

Subscribed & sworn to before me this Dec. 14, 1874.

C. E. HESS,
Com'r U. S. C't C't, W. Dist. of Mo.

And on the same day last aforesaid a "stipulation as to answer and proof" was filed and is in the words and figures following, to wit:

Stipulation as to answer and proof.

In the circuit court of the United States for the western district
29 of Missouri, November T., 1874.

CHARLES E. ANTHONY
vs.
JASPER COUNTY.

And now, December 14, 1874, it is hereby agreed by and between the parties to this suit, acting by their attorneys, that the amended answer filed by the defendant shall stand and be considered as an answer to each and every count in the plaintiff's petition; and it is further agreed that the production and proof of one of the bonds, such as are described in said petition, shall serve and be considered as the production and proof of all the bonds sued on by the plaintiff.

JOSEPH SHIPPEN,
Plaintiff's Attorney.
E. J. MONTAGUE,
Att'y for Def't.

And afterwards on the 20th day of January, A. D. 1875, plaintiff filed in the clerk's office of said circuit court additional counts to his petition in words and figures following, to wit:

Additional counts to petition.

In the circuit court of the United States, for the western district of Missouri. November term, 1875.

CHARLES E. ANTHONY, PLAINTIFF,
vs.
THE COUNTY OF JASPER, DEFENDANT. } No. 286.

And now, January 20th, A. D. 1875, comes Charles E. An-
30 thony, the plaintiff, and under and in accordance with the agreement and stipulation made and entered into between the plaintiff and defendant dated the 16th (14th) day of December, A. D. 1874, and on file in this case, now presents and files the following additional petitions and counts in the above stated suit:

And for another and further cause of action the plaintiff states, & c. c. (MEMORANDUM BY CLERK:—There follow 259 counts in every respect like the 79 counts in the original petition, except as to the number of the bond and number of coupon, and substituting the word "further" in place of the number of the counts or cause of action. See stipulation on page 55.)

And thereupon the plaintiff prays for judgment against the defendant for the amount of all of the coupons sued on in the original petition and in this additional petition together with interest thereon at the rate of seven per cent. per annum from maturity of the respective coupons, with costs, &c.

JOSEPH SHIPPEN,
Plaintiff's Attorney.

And afterwards, at said last mentioned regular stated term of said circuit court the following further proceedings were had in this case on the 1st day of February, A. D. 1875, being an adjourned day of said term, to wit:

31 *Case submitted.*

CHARLES E. ANTHONY
vs.
JASPER COUNTY. } No. 286.

Now come the parties by their attorneys, the plaintiff by Joseph Shippen, and the defendant by E. J. Montague, and submit this cause to the court, upon the pleadings and proof herein, and the court not being fully advised what judgment to render herein, takes time to consider thereof.

And the plaintiff files a demurrer to defendant's evidence in words and figures following:

Demurrer to def't's evidence.

CHARLES E. ANTHONY
vs.
JASPER COUNTY. } No. 286.

And now, February 1, 1875, the plaintiff, upon the closing of the evidence of the defendant adduced upon the trial of this cause, demurs thereto, and for ground of demurrer states that said evidence, if true, is not sufficient to sustain defendant's defence.

JOSEPH SHIPPEN,
Plaintiff's Attorney.

And afterwards, at the regular stated term of said circuit court begun and held on the third Monday of April, A. D. 1875, at the place aforesaid, the following further proceedings were had in this case on the 28th day of April, A. D. 1875, to wit:

To file add'l briefs.

CHARLES E. ANTHONY
vs.
JASPER COUNTY. } No. 286.

32 Ordered, that plaintiff file additional briefs herein on or before the first day of June next, and that the defendant file additional brief on or before the first day of July next.

And afterwards, at the regular stated term of said circuit court begun and held on the third Monday of November, A. D. 1875, at the place aforesaid, the following further proceedings were had in this case on the 18th day of November, A. D. 1875, to wit:

Submission set aside.

CHARLES E. ANTHONY
vs.
JASPER COUNTY. } 286.

This day come the parties by their attorneys, the plaintiff by Joseph

Shippen, esq'r, and the defendant by James F. Hardin, esq'r, and by consent it is ordered that the submission of this case be set aside, and upon motion of defendant's attorney leave is granted defendant to amend his answer herein by interlineation; and upon further motion it is ordered that either party may take further testimony, and case continued. (See amended answer heretofore copied.)

And afterwards, at the regular stated term of said circuit court begun and held on the third Monday of April, A. D. 1876, at the place aforesaid, the following further proceedings were had in this case on the 18th day of April, A. D. 1876, to wit:

33 *Case submitted.*

CHAS. E. ANTHONY
vs. } 286.
JASPER COUNTY.

This day come the parties by their respective attorneys, the plaintiff by Joseph Shippen, esqr., and the defendant by E. J. Montague, esqr., and this cause being regularly called for trial and a jury being waived, the same is, after argument of counsel, submitted to the court, sitting as a jury upon the pleadings and proofs, and taken under advisement.

And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 21st day of April, A. D. 1876, to wit:

Judgment.

CHARLES E. ANTHONY
vs. } 286.
JASPER COUNTY.

This day come the parties by their attorneys, and this cause having been heretofore submitted to the court, after full consideration thereof, and being fully advised in the premises, the court finds for the defendant upon the issues joined herein.

It is therefore considered by the court that the defendant go hence without day and recover against the plaintiff its costs herein expended, and have therefor execution; and a special finding of facts and the conclusion of law thereupon is filed herein, and ordered made
34 part of the record, and which said special finding is in the words and figures following, to wit:

Special finding.

In the circuit court of the United States for the western district of Missouri.

CHARLES E. ANTHONY, PLAINTIFF,
vs. } No. 286. April 18, 1876.
JASPER COUNTY, DEFENDANT.

And now, on this day, come the parties, the plaintiff by Joseph Shippen, esq., his attorney, and the defendant by E. J. Montague, esq., its

attorney in the above-stated case, which, being fully heard and submitted to the court upon the pleadings and the evidence, the court doth make the following special findings of facts, and orders the same to be made part of the record, viz:

1. This action is brought for the collection of interest-coupons, originally attached to bonds of the following tenor:

Copy of bond.

Copy of bond and coupon.

UNITED STATES OF AMERICA.

No. 1.] State of Missouri, Jasper County bond. [$500.

Interest ten per cent. per annum.

Know all men by these presents, that the County of Jasper, in the State of Missouri, acknowledges itself indebted and firmly bound to the Memphis, Carthage and Northwestern Railroad Company, or bearer, in the sum of five hundred dollars, which sum said County of Jas-
35 per, for and on account of Marion Township, for value received, hereby promises to pay said company, or bearer, at the National Park Bank, in the city of New York, and State of New York, twenty years after date, with interest thereon from the date hereof at the rate of ten per centum per annum, payable semi-annually, on the first days of January and July of each year, on the presentation and delivery at said National Park Bank, in said city of New York, State of New York, of the coupons of interest hereto attached.

This bond is issued pursuant to an order of the county court of said county of Jasper, made by authority of an act of the general assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two thirds of the voters of said township.

In testimony whereof the said County of Jasper has executed this bond, by the presiding justice of the county court of said county, under the order of said court, signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing hereto the seal of said court. This done at the office of the clerk of said court, this 28th day of March, A. D. 1872.

36 [SEAL.] R. S. MERWIN,
Presiding Justice of the County Court of Jasper County, Missouri.

A. E. GREGORY,
Clerk of the County Court of Jasper County, Missouri.

Coupon.

CARTHAGE, *Jasper Co.*, , 1872.

The County of Jasper promises to pay the sum of twenty-five dollars, on the first day of July, 1873, being interest on bond No. 1, for $500, payable at the National Park Bank, in the city and State of New York.

A. E. GREGORY,
Clerk of the County Court of Jasper County, Missouri.

2. That at a regular term of the county court of Jasper County, Missouri, held on the 10th day of February, 1872, the following, among other proceedings, was had, to wit:

Whereas more than twenty-five persons, tax-payers and residents of the municipal township of Marion, in the county of Jasper, in the State of Missouri, have petitioned this court, setting forth their desire as a township to subscribe to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, proposing to build a railroad
37 into and through said township; that the amount they desire to subscribe is seventy-five thousand dollars, upon the following named terms and conditions, viz:

First. That the railroad of said company be continued and extended through said township of Marion, from the depot at Carthage westward to some point on the Missouri River, Fort Scott and Gulf Railroad, in the State of Kansas, within nine months from the 1st day of March, one thousand eight hundred and seventy-two, and that the work of grading and constructing be commenced within twenty days after the date of making the subscription and be pushed vigorously until completed.

Second. That the machine and repairing shops of the said company be permanently located, and forever maintained, within three-quarters of a mile of the public square in Carthage, and said shops with their equipments, when completed, shall cost not less than three hundred thousand dollars; that the construction of said shops shall begin within sixty days after the cars are running to the depot at Carthage, and be completed within one year.

Third. That said subscriptions shall be paid by the issuing and delivery of the bonds of said township to the said railroad company, said bonds to be of the denomination of five hundred dollars each, to bear date on the day and year when said railroad company shall be-
38 come entitled to receive the same under the stipulations herein contained; aforesaid bonds to bear ten per centum interest per annum from the date they are delivered, the interest payable semi-annually and represented by the coupons to be attached, the principal payable twenty years after date, and both the principal and interest payable at the National Park Bank in the city of New York, in the State of New York. Said railroad shall be equal to the standard construction of railroads in the State of Missouri, and of the same guage of the Atlantic and Pacific Railroads. The aforesaid bonds shall be issued and be placed in escrow and bear interest as aforesaid from the date of the delivery of said bonds to the aforesaid railroad company.

Fourth. That when the cars are running regularly on said railroad, for the transportation of freight and passengers, from the town of Pierce City, in Lawrence County, Missouri, into and through Marion Township, to the depot at Carthage, thence westward to a point on the Missouri River, Fort Scott and Gulf Railroad, within the time specified in the first specification herein, to wit, nine months from the first day of March, one thousand eight hundred and seventy-two, and making regular connection with the Atlantic and Pacific Railroad at Pierce City, in the county of Lawrence in the State of Missouri, and the Mis-
39 souri River, Fort Scott and Gulf Railroad, in the State of Kansas, fifty thousand dollars of said bonds shall be delivered to said company in payment of fifty thousand dollars of said subscription, and when at least fifty thousand dollars shall have been first expended and

paid out towards the construction of said machine and repair shops, and work begun in good faith for their erection, then twenty-five thousand dollars more of said bonds shall be delivered to said company.

3. That at a special term of the county court of Jasper County, Missouri, held on the 28th day of March, 1872, the following among other proceedings was had, to wit:

In the matter of a subscription to the capital stock of the Memphis, Carthage and Northwestern Railroad Company in behalf of Marion Township: Whereas it appearing from the returns of an election held in pursuance of an order of this court, on Tuesday, the 5th day of March, A. D 1872, that more than two thirds of the qualified voters of the municipal township of Marion, in Jasper County, Missouri, voting at said election are in favor of subscribing to the capital stock of the Memphis, Carthage and Northwestern Railroad Company seventy-five thousand dollars, upon the terms and conditions as set forth in the
40 petition heretofore presented, and the order of this court, made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made, and wherefore it is ordered by the court that the sum of seventy-five thousand dollars be and is hereby subscribed to the capital stock of said railroad company in behalf of said Marion Township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court, and attested by the clerk of this court with the seal of this court affixed.

4. That at an adjourned term of the county court of Jasper County, Missouri, held on the 4th day of June, A. D. 1872, the following among other proceedings was had, to wit:

Ordered by the court, that the fifty thousand dollars of Marion Township bonds voted to the Memphis, Carthage and Northwestern Railroad Company be issued, and that the clerk of this court have the same registered according to law, and that when so registered the same shall be deposited in escrow in some responsible banking-house in the city of St. Louis.

41 5. That by an act of the general assembly of the State of Missouri, entitled "An act to provide for the registration of bonds issued by counties, cities and incorporated towns, and to limit the issue thereof," approved March 30, 1872, enacted inter alia—

SECTION 4. Before any bond hereafter issued by any county, city, or incorporated town for any purpose whatever shall obtain validity or be negotiated such bond shall first be presented to the State auditor, who shall register the same in a book or books provided for that purpose in the same manner as the State bonds are now registered, and who shall certify by indorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract u der which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be prima facie evidence only of the facts therein stated and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceedings to test or determine the validity of such bonds or the power of any county court, city, or town council or board of trustees or other authority to issue such bonds, and the remedy by injunction shall
42 also lie at the instance of any tax-payer of the respective county,

city, or incorporated town to prevent the registration of any bonds alleged to be illegally issued or founded under any provision of this act.

6. That John Purcell was the presiding justice of the county court of Jasper County on the 28th day of March, 1872, and continued to hold said office until the day of September, 1872, when he resigned, and that R. S. Merwin was a member of the said county court in March, 1872, and until the 21st day of October, 1872, when he became and thereafter was the presiding justice of said court, and these facts appear by the records of said court.

7. That the bonds in controversy were sealed with the seal of the county court of Jasper County, affixed by the clerk and signed by the clerk, and at the same said bonds were signed by the said R. S. Merwin, which was after he became the presiding justice of said county court in October, 1872. Merwin delivered the said bonds in October, 1872, to the Union Savings Association of St. Louis, for the use of one Edward Burgess, a contractor for the building of the railroad of the company named in the bonds, having first removed the first two coupons, and the said bonds were purchased by one William C. Wilson from said
43 Burgess at the rate of fifty-five cents on the dollar, which was then the market value of said bonds, and the same were paid for in November, 1872, by the said Wilson giving his check to Burgess for the amount ($27,500) on the said savings association, which check was paid. Neither the other justice of the county court nor the county court consented to the said delivery of the said bonds by Merwin to or for the use of Burgess. The said railroad for which the bonds issued was finished through said Marion Township, but the said railroad company has never complied with the condition of the vote requiring its railroad to be continued and extended through said township Marion from the depot at Carthage westward to some point on the Missouri River, Fort Scott, and Gulf Railroad in the State of Kansas, and there now still remains about nine miles of such railroad to be constructed in Kansas.

8. That said bonds when signed, sealed, and delivered as aforesaid, were antedated so as to bear date the 28th day of March, 1872, and they were never presented to the State auditor, and he never registered the same nor made any certificate thereon under the provisions of said statute, approved March 30, 1872, and said bonds as held by the
44 plaintiff contain no certificate of registration endorsed or written thereon.

9. That the plaintiff is a bona fide purchaser of said bonds and coupons for value without actual notice of any matter or fact impairing the regularity or validity of said bonds, and without actual notice that the said bonds had been ante-dated so as to bear date prior to the 30th day of March, 1872.

Conclusion of law.

Upon the foregoing facts we find as a conclusion of law that the plaintiff is not entitled to recover, and that there must be a judgment for the defendant; to which finding and conclusion of law the plaintiff then and there excepted.

JOHN F. DILLON, *Judge.*
A. KREKEL, *Judge.*

The following opinion was filed in support of the foregoing conclusion:

Opinion of the court.

DILLON, circuit judge:

The well known history of the issue of municipal bonds in this State,

as it appears by the many cases in this court, shows that conditions imposed by law requiring a popular vote, or conditions in the pro-
45 positions submitted to the voters intended to prevent fraud and to secure the actual building and completion of the roads, have been often evaded and the bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts have held to be binding.

To prevent such improper or improvident issue of bonds in the future the legislature passed the act of March 30, 1872 (Laws 1872, p. 56). The fourth section of that act provides that "before any bond hereafter issued by any county * * shall obtain validity or be negotiated," it must be first registered by the State auditor, who shall certify thereon that all conditions precedent required by law and by the contract under which the bonds were ordered to be issued have been complied with.

In this case the bonds were signed, sealed and issued in the manner above appearing after this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact the conditions on which the bonds had been voted had not been fully complied with, and hence they could not have been and were not certified by the auditor as registered bonds. The bonds have found their way into the hands of an innocent holder for value, who did not know that
46 the bonds bore a false date. If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no "validity," and hence could not support an action in the hands of any person. But they are antedated, and the question is whether they have validity in the hands of an innocent purchaser?

Upon the best consideration we have been able to give, our conclusion is that the bonds cannot be enforced.

The case comes within the doctrine which is well settled, that where a statute declares absolutely and without exception that a contract or bond or note is void, it is void into whosesoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated.

Bonds must first be registered; without registration they "obtain no validity." Such is the statute. A declaration that bonds shall have no validity is equivalent to declaring them to be void.

Is the county estopped to set up this defense? We think not. The case is to be distinguished from those decided by the Supreme Court of the United States, in which it is held that the frauds of the officers cannot be visited upon the innocent bondholder, and falls
47 within the case of Bayley v. Tabler, 5 Mass., 286. In that case it was held, where a statute enacted that promissory notes of a certain description, "made or issued" after a specified day, should be "utterly void and no action should be sustained thereon," that it was competent to the makers of such notes, when sued upon notes bearing date before the day fixed by the statute, to prove that they were, in fact, made and issued after such day.

The principle of that case is the same as in the case at the bar; and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law, the other officers being innocent of wrongful participation.

The principle involved is one of great consequence. For illustration, loose and general powers have been heretofore given in this State to

municipalities and counties to issue such bonds; this power has been taken away by the new constitution; can the protective provisions of that instrument be evaded and rendered useless by the mere fraud-
48 ulent act of the officers of the county in antedating the bonds? If so, the power to defraud is endowed with a fearful vitality, which survives the prohibition of the constitution and threatens to become immortal.

Krekel, J., concurs.

Joseph Shippen for the plaintiff.

E. J. Montague for the county.

And afterwards, at said last mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 26th day of April, A. D. 1876, to wit:

Writ of error, &c.

CHARLES E. ANTHONY } 286.
vs.
JASPER COUNTY. }

This day comes the plaintiff by Joseph Shippen, esq., his attorney, and presents to the court a writ of error to reverse the decision of this court in the above cause rendered, and a citation admonishing the defendant to appear at a Supreme Court of the United States on the second Monday of October next, as well as an appeal bond herein; and thereupon said writ of error is allowed, citation signed, and bond approved by the court.

And afterwards, at said last mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 9th day of May, A. D. 1876, to wit:

49 CHARLES E. ANTHONY } 286.
vs.
JASPER COUNTY. }

This day comes the plaintiff by Joseph Shippen, esqr., his attorney, and files herein motion to set aside order allowing writ of error herein; and said motion being submitted to the court, it is ordered that the same be sustained and that said order be set aside; and also comes said attorney and files a retraxit of said writ of error, and also files a motion to set aside the judgment heretofore entered herein; whereupon, on motion, it is ordered that said motion be set down for hearing on the June rule day, 1876, and that the clerk notify parties, which said motion to set aside order for writ of error is in words and figures following, to wit:

Motion to set aside order for writ of error.

In the circuit court of the United States for the western district of Missouri.

CHARLES E. ANTHONY } No. 286.
vs.
JASPER COUNTY. }

And now comes the plaintiff and moves the court to set aside the order heretofore at this term made in this case granting a writ of error to the United States Supreme Court.

JOSEPH SHIPPEN,
Pl'ff's Att'y.

50 And which said retraxit of writ of error, so filed, is in words and figures following, to wit:

Retraxit of writ of error.

In the circuit court of the United States for the western district of Missouri.

CHARLES E. ANTHONY } *vs.* } No. 286.
JASPER COUNTY. }

And now comes the plaintiff and retracts the writ of error herein before applied for.

JOSEPH SHIPPEN,
Pl'ff's Att'y.

And which said motion to aside judgment, so filed, is in words and figures following, to wit:

Motion to set aside judg't.

In the circuit court of the United States for the western district of Missouri.

CHARLES E. ANTHONY } *vs.* } No. 286.
JASPER COUNTY. }

And now comes the plaintiff and moves the court to set aside the judgment heretofore at this term rendered in favor of the defendant upon the special finding of facts, and to enter judgment for the plaintiff as prayed in his petition for the full amount of the coupons sued on, which were issued for and on behalf of Marion Township, on the following grounds:

1st. That upon the law applicable to the facts as found by the
51 court, the court erred in rendering judgment for the defendant, and should have rendered judgment for the plaintiff.

2d. That the act of the general assembly of the State of Missouri, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," approved March 30, 1872, has no application to the class of bonds herein sued on, which were issued for and on behalf of a township.

JOSEPH SHIPPEN,
Pl'ff's Att'y.

And afterwards, at the regular stated term of said circuit court, begun and held on the third Monday of November, A. D. 1876, at the place aforesaid, the following further proceedings were had in this case on the 21st day of November, A. D. 1876, to wit:

Motion to set aside judg't overruled.

CHARLES E. ANTHONY } *vs.* } 286.
JASPER COUNTY. }

This cause having been heretofore submitted to the court upon the motion of plaintiff to set aside the judgment herein, and the court being fully advised in the premises, now orders that said motion be and the same is overruled.

52 And afterwards, at said last-mentioned regular stated term of said circuit court, the following further proceedings were had in this case on the 27th day of November, A. D. 1876, to wit:

Pl'ff excepts to judg't.—Appeal bond approved.—Writ of error & citation all'd & signed.

CHARLES E. ANTHONY
vs. } 286.
JASPER COUNTY.

This day comes the plaintiff by Joseph Shippen, esqr., his attorney, and excepts to the judgment of the court herein, and the order overruling his motion for a rehearing. And said plaintiff also presents to the court a bond for a writ of error in the sum of five hundred dollars, which is approved; and thereupon said plaintiff presents a writ of error to reverse the decision of this court and a citation directed to said defendant, admonishing it to appear at a Supreme Court of the United States on the second Monday of October next, and said writ is allowed by the court and said citation signed, which said appeal bond is in the words and figures following, to wit:

53 Know all men by these presents that we, Charles E Anthony, as principal, and Wm. C. Wilson and Alex'r D. Wilson, as sureties, are held and firmly bound unto the county of Jasper, in the State of Missouri, in the full and just sum of five hundred dollars, to be paid to the said county of Jasper, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals and dated this 25th day of Nov'r, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at the November term, A. D. 1876, of the circuit court of the United States for the western district of Missouri, in a suit depending in said court between Charles E. Anthony, plaintiff, and the county of Jasper, in the State of Missouri, defendant, judgment was rendered against the said plaintiff; and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, D. C. on the second Monday of October next:

Now the condition of the above obligation is such, that if the said plaintiff shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

CHARLES E. ANTHONY, [SEAL.]
By JOHN M. WILSON, *Ag't.* [SEAL.]
WM. C. WILSON. [SEAL.]
ALEX'R D. WILSON. [SEAL.]

Sealed and delivered in presence of—

Approved by—

ARNOLD KREKEL, *Judge.*

54 STATE OF MISSOURI,
County of St. Louis, ss:

Alexander D. Wilson, being duly sworn, says that he and his co-obli-

gor in the within bond are each worth more than one thousand dollars over and above his debts and property exempt from execution by law and both reside in the city of St. Louis.

ALEX'R D. WILSON.

Sworn to and subscribed this 25th day of November, 1876, before me.
[SEAL.] HENRY KAUFFELD,
Notary Public, St. Louis Co. Missouri, qualified April 19, 1876, *and my term of office expires April 7th*, 1882.

(Indorsed:) No. 286. United States circuit court, western district of Missouri. Charles E. Anthony vs. Jasper County. Appeal bond. $500. Dated 25th day of Nov. 1876. Filed 29th day of Nov. 1876. H. C. Geisberg, clerk.

55 And afterwards on the 15th day of March, A. D. 1877, there was filed in the clerk's office of said circuit court of the United States for the western district of Missouri a stipulation as to transcript in words and figures following to wit:

In the circuit court of the United States for the western district of Missouri.

CHARLES E. ANTHONY, PLAINTIFF,
vs.
JASPER COUNTY, DEFENDANT. } No. 286.

It is hereby agreed and stipulated by and between the parties in the above-entitled cause, that the transcript of the record upon writ of error to be filed in the Supreme Court of the United States shall contain one count of plaintiff's petition and defendant's amended answer; and that the several other counts of plaintiff's petition and supplemental petition and defendant's original answer may be omitted from said transcript, and that no objection to said transcript shall be made because of such omission: and that the clerk of this court shall set forth in said transcript the number of counts in plaintiff's petition and supplemental petition, and the aggregate sum sued for in the said several counts;
56 and that this stipulation shall be copied in said transcript and be made part of the record in said cause.

JOSEPH SHIPPEN,
Plff's Atty.
E. J. MONTAGUE,
Att'y for Deft.

M'CH 12, 1877.

57 UNITED STATES OF AMERICA,
Western District of Missouri, set:

I, Henry C. Geisberg, clerk of the circuit court of the United States for said district, do hereby certify that the foregoing writing is a true copy of the record and proceedings in case (No. 286) of Charles E. Anthony, plaintiff, against the county of Jasper, in the State of Missouri, def't, as fully as the same remains on file and of record in my office.

Witness my hand as clerk and the seal of said court this fifteenth day of March, 1877.

[SEAL.] H. C. GEISBERG, *Clerk.*

(Indorsement on cover:) No. 128. Charles E. Anthony, plaintiff in error, vs. The County of Jasper. W. Missouri C. C. U. S. Filed 2d April, 1877.

SUPREME COURT

OF THE

UNITED STATES.

No. 128.

CHARLES E. ANTHONY, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF JASPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF PLAINTIFF IN ERROR.

JOSEPH SHIPPEN,
Plaintiff's Attorney.

SUPREME COURT OF THE UNITED STATES

No. 128.

CHARLES E. ANTHONY, PLAINTIFF IN ERROR,

VS.

THE COUNTY OF JASPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

PLAINTIFF'S BRIEF.

STATEMENT.

This action was brought by Charles E. Anthony, plaintiff in error, in the Circuit Court of the United States for the Western District of Missouri, for the collection of interest coupons detached from negotiable bonds issued by the County of Jasper, defendant, for and on behalf of Marion Township in said county, pursuant to authority of an Act of the General Assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the State of Missouri," approved March 23, 1868.

Judgment was rendered for the defendant by the Circuit Court upon the following

SPECIAL FINDINGS OF FACT.

1. This action is brought for the collection of interest coupons originally attached to bonds of the following tenor:

UNITED STATES OF AMERICA,

STATE OF MISSOURI.

JASPER COUNTY BOND. $500.

Interest, ten per cent. per annum.

Know all men by these presents, that the County of Jasper, in the State of Missouri, acknowledges itself indebted and firmly bound to the Memphis, Carthage & North Western Railroad Company, or bearer, in the sum of five hundred dollars, which sum the County of Jasper, for and on account of Marion Township, for value received, hereby promises to pay said Company, or bearer, at the National Park Bank, in the City of New York, and State of New York, twenty years after date, with interest thereon, from the date hereof, at the rate of ten per cent. per annum, payable semi-annually, on the 1st day of January and July of each year, on the presentation and delivery at said National Park Bank, in said City of New York, of the coupons of interest hereto attached. This bond is issued pursuant to an order of the County Court of said County of Jasper, made by authority of an act of the General Assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said Township.

In testimony whereof the said County of Jasper has executed this bond by the Presiding Justice of the County Court of said County, under the order of said Court, signing his name hereto, and by the Clerk of said Court, under the order thereof, attesting the same, and affixing thereto the seal of said Court. This done at the office of

the Clerk of said Court, this 28th day of March, A. D. 1872.

R. S. MERWIN,
Presiding Justice of the County Court of Jasper County, Missouri.

A. E. GREGORY,
Clerk of the County Court of Jasper County, Missoui.
[SEAL]

CARTHAGE,
Twenty-five] JASPER Co., March 28, 1872. [Twenty-five

The County of Jasper promises to pay the sum of Twenty-Five Dollars on the first day of January, 1878, being interest on Bond No. 33 for $500—payable at the National Park Bank, in the City and State of New York.

A. E. GREGORY,
Clerk of the County Court, Jasper Co., Missouri.

2. That at the regular term of the County Court of Jasper County, Missouri, held on the 10th day of February, 1872, the following, among other proceedings, was had, to wit:

"WHEREAS, More than twenty-five persons, tax-payers and residents of the municipal township of Marion, in the County of Jasper, in the State of Missouri, have petitioned this Court setting forth their desire as a township to subscribe to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, proposing to build a railroad into and through said township; that the amount they desire to subscribe is seventy-five thousand dollars, upon the following named terms and conditions, viz:

"First. That the railroad of said Company be continued and extended through said township of Marion, from the depot at Carthage, westward to some point on the Missouri River, Fort Scott and Gulf Railroad, in the State of Kansas, within nine months from the 1st day of March, one thousand eight hundred and seventy-two, and that the work of grading and constructing be commenced within twenty days after the date of making the subscription and be pushed vigorously until completed.

"Second. That the machine and repairing shops of the said company be permanently located and forever

maintained within three-quarters of a mile of the public square in Carthage, and said shops, with their equipments, when completed, shall cost not less than three hundred thousand dollars; that the construction of said shops shall begin within sixty days after the cars are running to the depot at Carthage, and be completed within one year.

"Third. That such subscription shall be paid by issuing and delivering of the bonds of said township to the said railroad company, said bonds to be of the denomination of five hundred dollars each, to bear date on the day and year when said railroad company shall become entitled to receive the same under the stipulations herein contained. Aforesaid bonds to bear ten per centum interest per annum from the date they are delivered, the interest payable semi-annually, and represented by the coupons to be attached, the principal payable twenty years after date, and both the principal and interest payable at the National Park Bank, in the City of New York, in the State of New York. Said railroad shall be equal to the standard construction of railroads in the State of Missouri, and of the same guage as the Atlantic and Pacific Railroad. The aforesaid bonds shall be issued and be placed in escrow and bear interest as aforesaid from the date of the delivery of said bonds to the aforesaid Railroad Company.

"Fourth. That when the cars are running regularly on said railroad for the transportation of freight and passengers from the town of Pierce City, in Lawrence County, Missouri, into and through Marion Township to the depot at Carthage, and thence westward to a point on the Missouri River, Fort Scott & Gulf Railroad within the time specified in the first specification herein, to-wit: nine months from the first day of March, one thousand eight hundred and seventy-two, and making regular connection with the Atlantic and Pacific Railroad at Pierce City in the County of Lawrence, in the State of Missouri, and the Missouri River, Fort Scott & Gulf Railroad in the State of Kansas, fifty thousand dollars, of said subscription, and when at least fifty thousand dollars shall have been first expended and paid out towards the construction of said machine and repair shops, and work begun in good faith for their erection, then twenty-five

thousand dollars more of said bonds shall be delivered to said company."

3. That at a special term of the County Court of Jasper County, Missouri, held on the 28th day of March, 1872, the following among other proceedings was had, to wit: "In the matter of a subscription to the capital stock of the Memphis, Carthage and Northwestern Railroad Company in behalf of Marion township.

"WHEREAS, it appearing from the returns of an election held in pursuance of an order of this court on Tuesday, the 5th day of March, A. D. 1872, that more than two-thirds of the qualified voters of the municipal township of Marion in Jasper county, Missouri, voting at said election, are in favor of subscribing to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, seventy-five thousand dollars upon the terms and conditions as set forth in the petition heretofore presented, and the order of this court made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made; now therefore, it is ordered by the court that the sum of seventy-five thousand dollars be and is hereby subscribed to the capital stock of said railroad company in behalf of said Marion township, according to the terms and conditions of said order of election, and that the bonds to be issued in payment of such subscription be signed by the presiding justice of this court, and attested by the clerk of this court with the seal of this court affixed."

4. That at an adjourned term of the County Court of Jasper County, Missouri, held on the 4th day of June, A. D., 1872, the following among other proceedings was had, to wit:

"Ordered by the court that the fifty thousand dollars of Marion township bonds voted to the Memphis, Carthage and Northwestern Railroad Company be issued, and that the clerk of this court have the same registered according to law, and that when so registered, the same shall be deposited in escrow in some responsible banking house in the city of St. Louis."

of any matter or fact impairing the regularity or validity of said bonds, and without actual notice that the said bonds had been antedated so as to bear date prior to the 30th day of March, 1872.

ERRORS ASSIGNED.

1. The Court below erred in rendering judgment on the special findings of fact in favor of defendant.

2. The Court below erred in not rendering judgment on the special findings of fact in favor ot the plaintiff.

POINTS OF LAW.

I.

The act of the General Assembly of the state of Missouri, entitled "An act to facilitate the construction of railroads in the state of Missouri," approved March 23d, 1868, which is recited in the bonds conferred the authority upon defendant to issue the bonds in controversy.

[For text of said Township Aid Law, see Appendix A. hereto.]

The State vs. Linn County, 44 Mo., 504—in 1869.
Ranney vs. Baeder, 50 id. 600—in 1872.
McPike vs. Pen, 51 id. 63—in 1872.
State vs. Cunningham, 51 id. 479—in 1873.
Rubey vs. Shain, 54 id. 207—in 1873.
State vs. Bates County, 57 id. 70—in 1874.
State vs. Clarkson, 59 id. 149—in 1875.
State vs. Daviess County, 64 id. 31—in 1875.
State vs. Cooper County, 64 id. 170—in 1876.

This point is expressly decided in

County of Cass vs. Johnson, 95 U. S. 360.

II.

The act of the General Assembly of the State of Missouri, entitled "An act to provide for the registration of bonds, issued by counties, cities and incorporated towns, and to limit the issue thereof," approved, March 30, 1872, has no application to township bonds issued under the act of March 23, 1868, such as are now in controversy, because:

1. The act does not embrace them expressly or in terms.

2. Nor by implication, for such implication is precluded by the distinct and peculiar character of these bonds, and by the inadaptibility of the provisions of the act thereto.

[For text of said Registration Law, see Appendix B. hereto.]

III.

Said Registration Law, as to any bonds, is prospective and not retroactive in its effect, and cannot invalidate bonds in the hands of a *bona fide* holder which purport to have been issued prior to the Law in payment of a stock subscription, made prior to the Law.

County of Moultrie vs. Savings Bank, 92 U. S. 631.

IV.

Defendant is estopped from making the attempted defence against the plaintiff who is a *bona fide* holder of these bonds. By the recitals of the bonds which state:

"This bond is issued pursuant to an order of the County Court of said County of Jasper, made by authority of an act of the General Assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D, 1868, and authorized by a vote of more than two-thirds of the voters of said Township.

"In testimony whereof the said County of Jasper has executed this bond by the Presiding Justice of the County Court of said County, under the order of said Court signing his name hereto, and by the Clerk of said Court, under the order thereof, attesting the same, and affixing thereto the seal of said Court. This done at the office of the Clerk of said Court, this 28th day of March, A. D. 1872."

ARGUMENT.

I.

There was authority to issue these bonds.

Upon the constitutionality of the Township Aid Law of Missouri, and the authority thereby conferred on defendant to issue these bonds, plaintiff forbears from extended argument. Thereupon this court after full argument oral and printed, has directly and unambiguously passed in the case of the County of Cass vs. Johnson, 95 U. S. 360. Relying thereon, courts have acted and people have invested. We confidently rely on this deliberate decision.

II.

The Registration Law has no application, express or implied, to Township Bonds issued under the Township Aid Law.

This statute does not embrace township bonds expressly or impliedly. From beginning to end no allusion is made to this class of securities or to the law under which they were authorized. The act purports to deal only with "counties, cities and incorporated towns;" the word *Township* is no where found.

That the act does not embrace them by implication is manifest, because, 1st, the distinct and peculiar character of these bonds precludes such implication; and 2d, the inadaptibility of the provisions of the act to this class of bonds also precludes such implication.

The act from beginning to end deals only with "counties, cities and towns," and their respective officers. Certainly the bonds in controversy are not those of a

city or incorporated town. Are they county bonds in such sense as to be included in the act by implication? The character of the bonds precludes this. This character has been clearly defined as a distinct species of securities, *sui generis*, by the decisions of all courts construing the act of March 23, 1868, by which they were authorized. In State *ex rel* &c. vs. Linn County, (44 Mo., 504) the Supreme Court of Missouri in 1869, in sustaining the act and granting a peremptory mandamus to issue such bonds, says per Wagner, Justice:

"The plain provisions of the act which governs this case *entirely negatives* the assumption that the bonds would in any event or contingency be the bonds of the county; the County Court is made the medium through which the bonds are to be issued in the name of the County. This is done, I suppose, because the Townships have no distinct and independent political organization. But still the law requires that the subscription be made by the Court in behalf of the Township: and it provides for the payment of interest and principal by the Townships exclusively. The mode of subjecting the property in the Townships made liable for payment of the tax is clearly pointed out. The collector is empowered to collect the special tax and pay it over to the treasurer, whose duty it is to keep it *separately* and apply it to the payment of the stock subscription according ta its terms, or the payment of the interest and principal as the case may be, *but in no event* does it become a charge on the county. *The bonds are not therefore in any sense County bonds.* The subscriptions ase *essentially* ownship subscriptions and the bonds *are to all intents and purposes Township bonds*, and the County Courts, and the counties named are merely made use of as agencies to effectuate and carry out that object."

In Jordan vs. Cass County, (3 Dillon C. C. Reports) November, 1873, in overruling a demurrer to a petition on Township bonds, the Court, per Dillon, J., says:

"It is clear that they (Township bonds) impose no obligation on the county and equally clear that the real

or ultimate liability is on the taxable wealth within the township. We are thus brought to the question whether a holder of bonds issued pursuant to the act of March 23, 1868, may recover judgment thereon against the county in whose name they were issued to be enforced if necessary, not by execution against the county, but by mandamus against the County Court to compel it to levy upon the property in the *Township* the special tax which the law has enjoined as a duty upon it. After some hesitation we have reached the conclusion that such an action will lie."

This was approved by the U. S. Supreme Court in Johnson vs. Cass Co., 96 U. S., 370.

In State vs. Clarkson, 59 Mo. 149, the Supreme Court of Missouri, per Wagner, J., in reversing a case wherein the lower Court had quashed a count of an indictment against a County Treasurer, because the money embezzled was averred to belong to a Township, says:

" Nor is the action of the court sustainable in quashing the second count. It is true that the township had no power to make independent contracts, and be bound in a separate capacity: but it was nevertheless a legal sub-division of the county—an organization for certain municipal purposes. The law under which the indebtedness accrued, for which the money was paid, to satisfy the township interest on its subscription to stock, was not a county liability. The name of the county was made use of as a medium, but the township was exclusively required to provide for the payment of the interest and principal. The subscriptions and the bonds issued were township bonds to all intents and purposes, and the County Courts were merely made use of as agencies to effectuate and carry out the objects of the law."

It is upon these decisions that the courts, the profession and the citizens have rested both as to the rights and remedies upon Township bonds. They are clear and consistent in their interpretation of the act of 1868, and show conclusively the inherent distinction between County bonds and Township bonds. The latter, although

the county can be sued in a representative capacity, are, in the words of Judge Wagner, "*not in any sense County bonds, in no event do they become a charge on the County; they are to all intents and purposes Township bonds.*" Surely it was for the Legislature to include Township bonds in the registration act by express terms, if it was intended they should be included. A court cannot accept the above character of these securities, and at the same time hold them to be county bonds under the registration act. *Judicis est dicere non dare legem.*

Is it argued that township bonds are within the mischief designed to be cured by the statute? This was for the legislature, not the courts, to say; the distinction between the two classes of securities cannot be ignored. But township bonds do not fall within the mischiefs to be cured. Previous to the act, holders of county, city and town bonds dealt directly with the financial officers chosen by their debtors. One patent design of the act was to protect the creditor by giving him greater security through registration, certification and collection, through independent and disinterested state officials. The need for like protection to holders of township bonds did not exist. As to them the County Court, elected by the whole county, made a court of record, with extensive executive and judicial powers, served as the independent and disinterested tribunal to protect their rights by duly administering the township affairs. Surely the conclusion follows from the character of the bonds that they are not included in the registration law by implication.

The inadaptability of the registration act to township bonds precludes the idea that they are embraced therein by implication. The act is entitled "An act to provide for the registration of bonds issued by *counties, cities and incorporated towns*, and to limit the issue thereof." "Section 1. No county, city, or incorporated town shall &c." "Section 4. Before any bond hereafter issued by any county, city, or incorporated town &c." And so

these words "county, city, and town," and the names of their respective governing officers are repeated time and again throughout the whole act. At the time the registration act was passed there existed authority of law in Missouri for the issue of bonds by (1) counties, (2) cities, (3) and towns, (4) and also by county courts on behalf of strips or portions of counties, (Wagner's Statutes, 876) (5) on behalf of townships, (W. S., 313; act of March 23, 1868) and also (6) on behalf of portions of townships, (W. S., 315, 60). Now as to the last three of these six classes of bonds the act is silent. Why? An examination of the 3d, 6th, 7th, 8th and 9th sections of the act shows they are wholly inapplicable to either of these three classes of bonds. "Section 3. It shall be the duty of the chief financial officer, clerk, auditor or comptroller of any county, city or incorporated town to furnish the state auditor a statement, verified by his oath, of all the bonds and coupons outstanding, with all the details the auditor may desire as to date of issue and maturity, rate of interest, place of redemption, purposes for which issued and the like." Section 6. The State Auditor shall annually on or before the first day of July, certify to the several county courts, city councils, or the trustees of any incorporated town the amount required during the next fiscal year for the payment of the maturing interest coupons together with any costs to the state, of collection and disbursement of the same, which amount shall thereupon be levied as *a special tax upon all property in such county*, city or town, and shall be collected with the state monies and paid over to the state treasurer to the credit of the several *counties*, cities or towns." Had the legislature intended that township bonds should be reported by the county clerk to the State Auditor, and that the State Auditor should certify back the amount of tax required from the respective townships, surely the act would have said so. No provision is made for any distinction to be preserved

between county bonds and township bonds. If township bonds are to be regarded for the purposes of this act as county bonds, then the 6th section requires that the interest be levied as a special tax "*upon all property in such county.*" This obliterates the distinction between county bonds and township bonds, which the constitution and laws of Missouri require to be preserved, and which the courts have so distinctly announced and uniformly preserved. The result is in direct conflict with the established character of these securities and would impose manifest wrong and injustice on the other portions of a county. Such an intention of fraud should not be imputed to the legislature. But the only way to escape making such imputation is to hold that this act does not apply to township bonds. In the unreported case of Cummiskey vs. St. Charles County, the U. S. Circuit Court for the Eastern District of Missouri, per Treat, District Judge, held that bonds issued by St. Charles County to reclaim swamp lands under act of March 14, 1870, (Wagner's Statutes, p. 876) did not require registration although dated and issued subsequent to the registration law. The ground of such decision was that under said law authorizing the bonds, payment could be had only by the taxation of a portion of the county, and not by "a special tax upon all the property in the county." The soundness of this decision extends to the case in hand. The methods provided by this act for the registration of bonds for maintaining the distinction between the bonds of counties, of cities and towns, for the certification of the interest by the State Auditor, for the levy of the special tax and the payment thereof to the State Treasurer, and for the disbursement of the same to the holders of the respective registered bonds are clear and distinct as to county, city and town bonds. But these methods are not appropriate in theory or practice to township bonds or to swamp land improvement bonds. If the county and state officials were to

attempt to extend the methods to these peculiar bonds they would be acting wholly without authority of law. An attempt so to do—an attempt to levy a special tax on all the property in a county to pay the interest certified by the State Auditor when designed to pay the interest on township bonds could be restrained by injunction. Hence the plaintiff herein respectfully submits and insists that the inapplicability of the registration law, precludes the idea that township bonds are included therein by implication.

III.

SAID STATUTE, EVEN IF HELD TO BE APPLICABLE TO TOWNSHIP BONDS IS PROSPECTIVE AND NOT RETROPESTIVE IN ITS EFFECT AND CANNOT INVALIDATE SUCH BONDS IN THE HANDS OF A BONA FIDE HOLDER, WHICH PURPORT TO HAVE BEEN ISSUED PRIOR TO THE LAW, IN PAYMENT OF A STOCK SUBSCRIPTION MADE PRIOR TO THE LAW.

The order of the County Court of March 28, 1872, by its language "*be and is hereby subscribed*," assumed to take, and did take, the stock with the consent of the railroad company. The words are those of an immediate present undertaking, and as between the parties made then and there a contract. For this there existed ample authority on the part of the defendant in the Township Aid law. The rights of the parties thereby became mutually fixed and defined. What remained thereafter was simply for the parties duly to carry into effect the contract as made. This is precisely the interpretation put upon the matter by the parties, and the bonds on their face purport to be in strict compliance with the contract as made March 28, 1872.

To add to or detract from this contract as made was not the intention of the Legislature. If it had been such

intention it was not in its power. By the contract the defendant became entitled to certain shares of stock in the railroad company, and at the same time the railroad company became entitled to receive the bonds to aid in the construction of its railroad. When the statute took effect, the arrangement was a thing accomplished. Any attempt on the part of the Legislature to surround the execution of the contract with expense, difficulties and delays, would serve to impair the obligation of such contract, and hence be void. A mere comparison of the dates is sufficient to establish this point as sound and correct.

See as an analogous case in point, County of Moultrie vs. Savings Bank, 92 U. S., 631. Therein it is held that the intervention of the constitution of the State of Illinois did not modify an existing contract of subscription, or affect the power to fulfill the contract by the issue of bonds that would otherwise have been prohibited.

Contrasting the county record of Moultrie County (page 633) with the defendant's record of March 28, 1872, it is evident that the latter is free from whatever doubt and ambiguity that attached to the former, whereof the Supreme Court says: "The resolution to subscribe was its own act; its immediate subscription." "No matter whether the contract was a subscription or an agreement to subscribe, it was not annulled or impaired by the prohibitions of the constitution. The delivery of the bonds was no more than performance of the contract." "It is hardly necessary to say under the act of the General Assembly, the authority to make a subscription was coupled with an authority and a duty to issue County bonds for the sum subscribed. No action of the Board was needed after the subscription was made."

It would be vain to search for any authority more nearly in point to sustain the plaintiff's proposition. If such be the law as to bonds issued subsequent to a constitutional prohibition, much less could a statute have

the effect to invalidate bonds issued pursuant to a contract made before the statute took effect. By giving such effect to the registration law it is rendered more potent than even a prohibitory constitutional provision. Thus the principle upon which the Moultrie County case was decided would be overthrown.

IV.

THE DEFENDANT IS ESTOPPED FROM MAKING ITS ATTEMPTED DEFENSE AGAINST A BONA FIDE HOLDER OF THESE BONDS BY REASON OF THEIR RECITALS.

The bonds were issued pursuant to law, under a two-thirds vote of the qualified voters of Marion Township. They properly related back thereto both in substance and in form, and received the date when the contract of taking the stock was effected. The bonds recite upon their face as follows:

"This bond is issued in pursuance to an order of the County Court of said County of Jasper, made by authority of an act of the General Assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the State of Missouri," and approved on the 23d day of March, A. D. 1868, and authorized by a vote of more than two-thirds of the voters of said Township."

"In testimony whereof said County of Jasper has executed this bond by the Presiding Justice of the County Court of said County, under the order of said Court, signing his name hereto, and by the Clerk of said Court, under the order thereof, attesting the same, and fixing thereto the seal of said Court. This done at the office of the Clerk of said Court, this 28th day of March, A. D. 1872."

By repeated familliar decisions on this subject, the U. S. Supreme Court has declared that purchasers of such bonds are entitled to rely upon their recitale.

In Hackett vs. the City of Ottaway, (Chicago Legal News, 1878, p. 240) it is said per Harlan, J.: "The bonds in suit, by their recitals of the titles of the ordinances under which they were issued in effect, assured the purchaser that they were to be used for municipal purposes, with the previous sanction duly given of a majority of the legal voters of the city. If he would have been bound under some circumstances to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard, by reason of the representation upon the face of the bonds, that the ordinances under which they were issued were ordinances providing for a loan for municipal purposes. Such a representation by the constituted authorities of the city under its corporate seal would naturally avert suspicion of bad faith upon their part and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that the purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped by its own representations to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against such holder, to dispute their validity. Had the bonds upon their face made no reference whatever to the charter of the city or recited only those provisions which empowered the council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to a *bona fide* holder could not be questioned. Much less can it be questioned in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes, that is, for purposes authorized by its charter. Supervisors vs. Schenck, 5 Wall., 784. It would be the grossest injustice and in conflict with all the past utterances of this court to permit the city having power under some circumstances to issue negotiable securities to escape liability, upon the ground of the falsity of its own representations made through official agents and under its corporate seal as to the purposes with which these bonds were issued. Whether such representations were made inadvertantly or with the intention, by the use of inaccurate titles of ordinan-

ces, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money centers of the country; in either case the city, both upon principle and authority, is cut off from any such defense. What this court declared through Mr. Justice Campbell in Zabriskie vs. C., C. & C. R. R. Co., 23 How., 400, as to a private corporation, and repeated through Mr. Justice Clifford in Bissell vs. City of Jeffersonville, 24 How., 289, as to a municipal corporation may be reiterated as peculiarly applicable to this case. A corporation, quite as much as an individual, is held to a careful adherence to the truth of their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced."

In Town of Orleans vs. Platt (Chicago Legal News, 1878, p. 279), it is said, per Swayne, J.:

"The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category: Murray vs. Lardner, 2 Wall., 110. This Court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities, and does so, the *bona fide* holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital." Citing:

Mercer County vs. Hackett 1 Wall., 83.
San Antonio vs. Mehaffy, 96 U. S., 312.
County of Moultrie vs. Savings Bank, 92 U. S., 631.
Moran vs. Commissioners, 2 Black, 722.
Knox vs. Aspinwall, 21 How. 539.
Royal British Bank, vs. Tarquand, 6 E. & B. 248.

Turning from these latest utterances of the U. S. Supreme Court, we find the same doctrine as clearly laid down in 1863 by the Supreme Court of Missouri, in Flagg vs. Palmyra, 33 Mo., 450.

"In this case, if the bonds had been issued by the City of Palmyra, in apparent compliance with the law, and themselves, give no evidence of a want of performance of the pre-requisites to their issuance, and no actual notice of any such defect is traced to the bondholders, we will not hold the bondholders to be affected by a failure of the officers of the City of Palmyra to perform all that was by the law required of them, in anticipation of and preparation for the issuing of these bonds. Being issued in apparent conformity to the law, the public (any of whom might acquire the bonds) is entitled to view them as issued in actual conformity to the law, and to suppose that all the acts required of the people and officers of the City of Palmyra In reference to the bonds have been duly performed. To apply these principles to the present case, we hold the bondholders to a knowledge of all that it contained in the act of the General Assembly to incorporate the City of Palmyra, and the amendatory acts above quoted; but (in the absence of actual notice) we do not hold them bound to inquire whether an election had been held as to the making of a subscription of stock in the Quincy & Palmyra Railroad Company, or as to the regularity of such an election or the qualifications of the votes thereat, or whether such subscription was made by the proper officer or officers of the City of Palmyra. The issuing of the bonds authorizes the receiver or purchaser thereof to suppose that all those things if required by law, have been done in the time, form and substance required by law."

The reasoning of these, as of many other cases, sustains plaintiff's proposition. The recital of the fact of the time when the instruments were made and issued is just as binding upon defendant as any other circumstance connected with the bond. Upon this the above cited case of County of Moultrie vs. Savings Bank, 92 U. S. 636, is quite conclusive. "The bonds recite that they are issued by the County of Moultrie, in pursuance of the subscription of the sum of $80,000 to the capital stock of the Decatur &c. R. R. Company, made by the Board of Supervisors of said County of Moultrie in December A. D. 1869, in conformity to the provisions of an act of the General Assembly of the State of Illinois, approved March 26, A. D. 1869."

"Now if it be supposed that the purchaser of bonds with such recitals was bound to look further and inquire what was the authority for the issue, where was he to look? Had he looked to the act of the General Assembly of March 26, 1869, he would have found plenary authority for a stock subscription, and for the issue of bonds in payment thereof. If he was bound to know that the constitutional provision terminated that authority after July 2d, 1870, he knew that any subscription made before that time continued binding, notwithstanding the constitution, and that bonds issued in payment of it were therefore lawful. If then, he had inquired whether a subscription had been made before July 2, 1870, at the only place where inquiry should have been made—namely, at the records of the Board—he would have found an order to subscribe, equivalent to a subscription made in December 1869, corresponding with the assertion of the recitals, and declared by them to have been a subscription. He could have made inquiry nowhere else with any prospect of learning the truth. Every step he could have taken assured him that the recitals were true. How then can the county be permitted to set up against a *bona fide* holder of the bonds, that the authority to make a subscription with all its legitimate consequences had expired before the subscription was made, in the face of the recitals and of county records? Whether it had expired was a matter of fact, not of law; and it was peculiarly, if not exclusively, within the knowledge of the Board of Supervisors. After having assured a purchaser that their subscription was made in December 1869, when they had power to make it, it would be tolerating a fraud to permit the county to set up when called upon for payment that it was not made until July 2, 1870, when their authority expired."

The recital herein relied on by the plaintiff is the one that distinctly appears on the face of the bonds. "This done at the office of the Clerk of said Court, this 28th day of March, A. D. 1872."

This is a material and important statement in the bond, constituting the date from which its maturity in twenty years must be calculated. It is presumably deliberately and accurately made. No good reason can be assigned

why its force and effect should not be as great as any other recital. To hold otherwise would be equivalent to saying that no one is safe in buying a Missouri municipal bond that is not registered. If dated and purporting to be issued *subsequent* to March 30, 1872, of course the bond must be registered; if dated and purporting to be issued prior to said date, it remains an open question, a subject of extrinsic evidence as to when in fact the bond was issued, and by the result of such investigation the bond must stand or fall under the statute. Where is such a doctrine to be found among all the cases relating to municipal bonds? There is none such. But defendant seeks refuge in an old case based on a statute relating to quite a different subject matter.

Defendant cites Bayley vs. Taber, 5 Mass., 285, which relates to notes of a form expressly prohibited by a Massachusetts statute. The statute was for the protection of the public, and related to a mischief pertaining to the current medium of exchange. For the general public good that statute was enacted, and as a mode of preventing an evil, very harsh results of forfeiture were visited on whoever might be concerned therein.

The purpose of this Missouri statute was the protection mutually of the makers and purchasers of these bonds. It was supposed that by registration and the newly devised mode of collecting and applying the municipal revenues, the credit of the securities would be enhanced The various classes would seem more homogeneous, and would be brought under one system of collection and enforcement through the State Auditor. To wards attaining this enhanced credit, the amount of the bonds was limited to 10 per cent. of the taxable wealth, and 2d, the bonds were required to be registered. Thereby protection and confidence would attach to the bonds, resulting to the advantage of both maker and purchaser. If the issue had been made excessive, it would have constituted no defense to the maker as against a *bona fide*

holder. We contend that if registration was not had, and the bonds were by the defendant issued purporting to precede the statute in time, it can, under the same principles of reasoning, constitute no valid defense. In other words the defendant is estopped by the terms of its bond.

Hence we contend that the case of Bayley vs. Taber furnishes no precedent to guide the determination of this case.

It may be added that said case was decided in 1809, and has never been accepted with favor or quoted as a sound authority in the Federal courts. Desty's Federal Citations omits to mention it as ever having been cited. The case of Bayley vs. Taber, in 6 Mass., is named in Desty, but that case following the one in 5th Mass. adjudged the notes to be valid.

Upon principle and authority therefore plaintiff contends that defendant is estopped from the attempted defense by the recitals of the bonds.

Upon the finding of the facts herein for the reasons above given, plaintiff prays that the judgment of the Court thereupon may be for him for the amount of the coupons sued for.

Respectfully submitted,

JOSEPH SHIPPEN,

Plaintiff's Attorney.

APPENDIX A.

TOWNSHIP AID LAW.

1 Wagner's Missouri Statutes, 313, Acts 1868, p. 92.

SECTION 51. Whenever twenty-five persons, tax payers and residents in any municipal township, for election purposes, in any county in this State, shall petition the County Court of such county, setting forth their desire, as a township, to subscribe to the capital stock of any railroad company in this State, building or proposing to build a railroad into, through or near such township, and stating the amount of such subscription, and the terms and conditions, on which they desire such subscription shall be made, it shall be the duty of the County Court, as soon as may be thereafter, to order an election to be held in such township, to determine if such subscription shall be made; which election shall be conducted and returns made in accordance with the law controlling general and special elections; and if it shall appear, from the returns of such election, that not less than two-thirds of the qualified voters of such township voting at such election are in favor of such subscription, it shall be the duty of the County Court to make such subscription in behalf of such township, according to the terms and conditions thereof, and if such conditions provide for the issue of bonds in payment of such subscription, the County Court shall issue such bonds in the name of the county, with coupons for interest attached; but the rate of interest shall not exceed ten per cent. per annum; and the same shall be delivered to the railroad company.

Acts 1871, March 10, SEC. 52. In order to meet the payments, on account of the subscription to the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate and personal property, including all

statements of merchants doing business within said city, town, township or county, lying and being within the township making the subscription in accordance with the valuation then last made by the county assessor for county purposes: *provided however*, that no county, city, town or township shall ever in the aggregate subscribe a sum exceeding ten per cent. of the last annual assessment within said county, city, town or township.

This act to take effect from and after its passage.

Acts 1868, p. 93, SEC. 53. The county treasurer shall be authorized and required to receive and collect of the sheriff, of the county the income from the tax provided in the previous section, and to apply the same to the payment of the stock subscription according to its terms, or to the payment of interest and principal on the bonds, should any be issued in payment of such subscription; he shall pay all interest on such bonds, out of any money in the treasury collected for this purpose, by the tax so levied, as the same becomes due, and also the bonds as they mature which shall be cancelled by the County Court, and this service shall be considered a part of his duty as county treasurer.

Ibid, p. 94. SEC. 54. Persons paying taxes to pay the stock subscription, made in accordance with the provisions of this act, or the bonds issued in payment of such subscription, shall receive from the collector a certificate, setting forth, in a definite manner, the facts, and such certificates, in sums of one hundred dollars, shall be converted into the stock of the railroad company receiving the subscription, and the County Court shall hold the stock subscribed in behalf of any township in trust for such tax-payers, to be transferred as they become entitled to it; and all persons residing in said township, or owning property subject to taxation therein, if they shall have in good faith subscribed to the capital stock of the railroad company receiving the subscription of such township and paid assessments on the same as they have been made by the company, shall to the extent of such subscription, receive credit on their tax levied in such township, to pay such railroad subscription.

Ibid, p. 94, SEC. 55. In all cases hereafter where a railroad or branch railroad in this State shall be built, in whole or in part, by subscriptions to its stock by coun-

ties, cities or townships, the proceeds of all State and county taxes levied upon such railroad company or branch so built, or the property thereof, shall be paid into the treasury of the counties where collected, and the county treasurers shall apportion the same, according to their several subscriptions, to such counties, cities or townships so subscribing stock, until the whole amount of such subscription is refunded to them: and such sums so apportioned shall be paid over to the county or city treasurer, and applied to the payment of the interest and principal of the bonds issued by such county or city on account of their subscription stock as aforesaid, if any are outstanding, and if not, it shall by them be placed to the credit of the school fund in such county, city or township.

APPENDIX B.

BOND REGISTRATION LAW.

An act to provide for the registration of Bonds issued by Counties, Cities and Incorporated Towns, and to limit the Issue thereof.

Be it enacted by the General Assembly of the State of Missouri:

SECTION 1. No county, city, or incorporated town, shall hereafter issue any bonds exceeding ten per cent. of the assessed value of such county, city, or incorporated town, nor shall any county, city or incorporated town have the right or power to issue any bonds whatever, so long as the whole bonded indebtedness of such county, city or town equal or exceed ten per cent. of its respective assessed value, according to the State and county assessment, of the last preceding year: *Provided*, That nothing in this section shall apply to bonds issued, or hereafter to be issued by cities, towns, and villages, for the sole use of erecting school houses or public buildings for educational purposes.

SEC. 2. All such bonds and interest coupons shall be made payable at some place certain, and whenever the county court, city council, or board of trustees, shall fail to designate the place of payment, then the same shall be paid at the State Treasury.

SEC. 3. It shall be the duty of the chief financial officers (clerk, auditor or comptroller) of any county, city or incorporated town, to furnish the State Auditor a statement, verified by his oath, of all the bonds and coupons outstanding, with all the details the auditor may desire, as to date of issue and maturity, rate of interest, place of redemption, purposes for which issued, and the like; and the said officer shall, annually thereafter, on or about the first day of January, make a statement of the bonds and coupons retired by his county, city or incorporated

town, since the last report. The State Auditor shall make entry of the bonds so reported.

SEC. 4. Before any bond, hereafter issued by any county, city, or incorporated town, for any purpose whatever, shall obtain validity, or be negotiated, such bonds shall first be presented to the State Auditor, who shall register the same in a book or books provided for that purpose, in the same manner as the State bonds are now registered, and who shall certify, by endorsement on such bond, that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with. And the evidence of that fact shall be filed and preserved by the Auditor. But such certificate shall be *prima facie* evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary, in any suit or proceedings to test or determine the validity of such bonds, or the power of any county court, city or town council, or board of trustees or other authority, to issue such bonds; and the remedy of injunction shall also lie at the instance of any taxpayer of the respective county, city or incorporated town, to prevent the registration of any bonds alleged to be illegally issued, or founded under any of the provisions of this act.

SEC. 5. The State Auditor shall receive a compensation of twenty-five cents for the registration of each bond hereafter issued, to be paid by his warrant, drawn upon the treasury of the respective county, city or town.

SEC. 6. The State Auditor shall annually, on the first day of July, certify to the several county courts, city councils, or trustees of any incorporated town, the amount required during the next fiscal year for the payment of maturing interest coupons, together with the ordinary costs to the State, of collection and disbursement of the same, which amount shall thereupon be levied as a special tax upon all property in such county, city or town, and shall be collected with the State revenue, and paid over to the State Treasurer, to the credit of the several counties, cities or towns; *Provided*, That this special tax may be paid in coupons registered under this act, over-due or maturing during the current fiscal year.

SEC. 7. The State Treasurer shall provide for the pay

ment of maturing coupons so registered, out of such funds, and no other, as may be in the treasury to the credit of the respective counties, cities and incorporated towns whose bonds have been registered undsr this act, in the same manner as he does for those issued by the State, and allow, at the expense of the maker, not more than the same compensation for redemption to the bank or banks at which they are made payable, than he does for the redemption of State coupons.

SEC. 8. It shall be the duty of the State Treasurer to apply the amount remaining to any county, city or town, after deducting the sum required for redemption of registered coupons maturing during the then current fiscal year, and six months thereafter, to the redemption of not matured bonds of such county, city or town, under the direction of the respective county court, city council, or trustees of any town. He shall certify at least once in every fiscal year, to the State Auditor, the several amounts and numbers of bonds and coupons by him or through him redeemed, and shall return such bonds and coupons, properly cancelled to prevent their re-issue, to the makers thereof.

SEC. 9. Nothing herein contained shall prevent any county court, city council or trustees of any incorporated town in this State, to levy a larger tax for the payment of maturing bonds, or to apply other means to such purpose; but all taxes levied for the payment of registered bonds or coupons, and all sums of money which are appropriated for the same purpose, shall be paid into the State Treasury, and all registered bonds and coupons shall be redeemed and cancelled by or under the direction of the State Treasurer.

SEC. 10. The State shall be deemed the custodian only of the several taxes so collected and credited to such county, city or town, and shall not be deemed, in any manner liable on account of any such bonds and coupons; but the tax and the funds so collected shall be deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until fully satisfied.

SEC. 11. Any county, city or town that desires to place its outstanding indebtedness under the provisions of this act, may do so by funding the same and issuing new bonds in lieu of the present ones, upon such terms,

and bearing such interest, with such length of time to run, as may be agreed upon between the county, city or town, and the holder of its bonds; *Provided, however*, That the contract for funding, with the terms of the same, shall be assented to by a majority of the qualified voters of such county, city or town, at a general or special election held therefor, and at least thirty days public notice of the same shall be published in every paper in the county, city or town; and when there are none, then by four printed hand-bills, put up in the most public places in every voting precinct in such county, city or town.

SEC. 12. When any county, city or town, shall order its outstanding indebtedness to be funded, as provided for in section eleven, a certified copy of the order of election, with the record of election, shall be sent to the Auditor, and he shall endorse the bonds issued under the same as funding bonds under this act.

SEC. 13. Nothing in the provisions of this act shall be construed as to include any bonds that have been or may be issued by any municipal corporation for gas works or water works.

SEC. 14. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

SEC 15. This shall take effect and be in force from and after its passage.

Approved, March 30, 1872.

Supreme Court of the United States,

OCTOBER TERM, 1879.

—o—

No. .....

—o—

CHARLES E. ANTHONY,

PLAINTIFF IN ERROR.

VS.

JASPER COUNTY,

DEFENDANT IN ERROR.

—o—

By E. J. MONTAGUE,

Attorney for Defendant-in-Error.

Printed and Bound at the PRESS Newspaper, Book and Job Printing Office, Carthage, Missouri.

Supreme Court of the United States,

OCTOBER TERM, 1879.

—o—

No. .....

—o—

CHARLES E. ANTHONY,

PLAINTIFF IN ERROR.

VS.

JASPER COUNTY,

DEFENDANT IN ERROR.

—o—

Statement of Facts by Defendant in Error.

Denfendant in Error relies upon the Special Finding of Facts as found by the Court below, and embodied in the Record, to-wit:

1. This action is brought for the collection of interest coupons originally attached to bonds of the following tenor:

COPY OF BOND AND COUPON.

"United States of America,
State of Missouri,

No. 1. Jasper County Bond. $500.

Interest ten per cent. per annum.

Know all men by these Presents: That the County of Jasper and State of Missouri acknowledge itself indebted and firmly bound to the Memphis, Carthage & Northwestern Railroad Company or bearer, in the sum of five hundred dollars, which sum said County of Jasper for and on account of Marion township, for value received, hereby promise to pay said company or bearer, at the National Park Bank, in the city of New York and state of New York, twenty years after date, with interest thereon, from the date thereof, at the rate of ten per cent per annum, payable semi-annually on the first days of January and July of each year, on the presentation and delivery at said National Park Bank, in said city of New York, state of New York, of the coupons of interest hereto attached. This bond is issued pursuant to an order of the County Court of said County of Jasper, made by authority of an act of the general assembly of the state of Missouri, entitled "An Act to facilitate the construction of railroads in the State of Missouri," and approved on the 23rd of March, A. D. 1868, and authorized by a vote of more than two thirds of the voters of said township. In testimony whereof the said county of Jasper has executed this bond by the presiding justice of the county court of said county, under the order of said court signing his name hereto, and by the clerk of said court, under the order thereof, attesting the same and affixing thereto the seal of said court. This done at the office of the clerk of said court this 28th day of March, A. D. 1872.

{SEAL}

R. S. MERWIN,
Presiding Justice of the County Court
of Jasper County, Mo.

A. E. GREGORY,
Clerk of the County Court of Jasper County, Missouri:

CARTHAGE, JASPER COUNTY,——1872.

The county of Jasper promises to pay the sum of twenty-five dollars on the first day of July, 1873, being interest on bond No. 1, for $500. payable at the National Park Bank in the City and State of New York.

A. E. GREGORY,
Clerk of the County Court of Jasper County, Missouri."

2. That at the regular term of the County Court of Jasper County, Missouri, held on the 10th day of February, 1872, the following, among other proceedings, was had, to-wit:

"WHEREAS, More than twenty-five persons, tax-payers and residents of the municipal township of Marion, in the County of Jasper, in the State of Missouri, have petitioned this court, setting forth their desire as a township to subscribe to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, proposing to build a railroad into and through said township; that the amount they desire to subscribe is seventy-five thousand dollars, upon the following named terms and conditions, viz:

"First. That the railroad of said company be continued and extended through said township of Marion, from the depot at Carthage, westward to some point on the Missouri River, Fort Scott and Gulf Railroad, in the State of Kansas, within nine months from the 1st day of March, one thousand eight hundred and seventy-two, and that the work of grading and constructing be commenced within twenty days after the date of making the subscription and be pushed vigorously until completed.

"Second. That the machine and repairing shops of the said company be permanently located and forever maintained within three-quarters of a mile of the public square in Carthage, and said shops, with their equipments, when completed, shall cost not less than three hundred thousand dollars; that the construction of said shops shall begin within sixty days after the cars are running to the depot at Carthage, and be completed within one year.

"Third. That such subscription shall be paid by issuing and delivering of the bonds of said township to the said railroad company, said bonds to be of the denomination of five hundred dollars each, to bear date on the day and year when said railroad company shall become entitled to receive the same under the stipulations herein contained. Aforesaid bonds to bear ten per centum interest per annum from the date they are delivered, the interest payable semi annually, and represented by the coupons to be attached, the principal payable twenty years after date, and both the principal and interest payable at the National Park Bank, in the City of New York, in the State of New York. 'Said railroad shall be equal to the standard construction of railroads in the State of Missouri, and of the same guage as the Atlantic and Pacific Railroad.' The afore-

said bonds shall be issued and be placed in escrow and bear interest as aforesaid from the date of the delivery of said bonds to the aforesaid Railroad Company.

"Fourth. That when the cars are running regularly on said railroad for the transportation of freight and passengers from the town of Pierce City, in Lawrence County, Missouri, into and through Marion township to the depot at Carthage, and thence westward to a point on the Missouri River, Fort Scott & Gulf Railroad within the time specified in the first specification herein, to-wit: nine months from the first day of March, one thousand eight hundred and seventy-two, and making regular connection with the Atlantic and Pacific Railroad at Pierce City in the County of Lawrence in the State of Missouri, and the Missouri River, Fort Scott & Gulf Railroad in the State of Kansas, fifty thousand dollars, of said subscription, and when at least fifty thousand dollars shall have been first expended and paid out towards the construction of said machine and repair shops, and work begun in good faith for their erection, then twenty-five thousand dollars more of said bonds shall be delivered to said company."

3d. That at a special term of the County Court of Jasper County, Missouri, held on the 28th day of March, 1872, the following among other proceedings was had, to-wit: "In the matter of a subscription to the capital stock of the Memphis. Carthage and Northwestern Railroad Company in behalf of Marion township.

"WHEREAS, It appearing from the returns of an election held in pursuance of an order of this court on Tuesday, the 5th day of March, A. D. 1872, that more than two-thirds of the qualified voters of the municipal township of Marion in Jasper county, Missouri, voting at said election, are in favor of subscribing to the capital stock of the Memphis, Carthage and Northwestern Railroad Company, seventy-five thousand dollars upon the terms and conditions as set forth in the petition heretofore presented, and the order of this court made on the 10th day of February, A. D. 1872, for said election, and that more than two-thirds of the voters of said township voted in favor of such subscription being made; now therefore it is ordered by the court that the sum of seventy-five thousand dollars be and is hereby subscribed to the capital stock of said railroad company in behalf of said Marion township, according to the terms and conditions of said order of election, and that the bonds to be

issued in payment of such subscription be signed by the presiding justice of this court, and attested by the clerk of this court with the seal of this court affixed."

4. That at an adjourned term of the County Court of Jasper County, Missouri, held on the 4th day of June, A. D., 1872, the following among other proceedings was had, to-wit: "Ordered by the court that fifty thousand dollars of Marion township bonds voted to the Memphis, Carthage and Northwestern Railroad Company be issued, and that the clerk of this court have the same registered according to law, and that when so registered, the same shall be deposited in escrow in some responsible banking house in the City of St. Louis.

5. That by an act of the general assembly of the state of Missouri, entitled "an act to provide for the registration of bonds, issued by counties, cities and incorporated towns, and to limit the issue thereof," approved March 30, 1872, enacted *inter alia:*

Section 4. Before any bond hereafter issued by any county, city or incorporated town, for any purpose whatever, shall obtain validity, or be negotiated, the same shall be presented to the state auditor, who shall register the same in a book or books provided for that purpose in the same manner as the state bonds are now registered, and who shall certify by endorsement on such bond that all the conditions of the laws have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with; and the evidence of that fact shall be filed and preserved by the auditor. But such certificate shall be *prima facie* evidence only of the facts therein stated and shall not preclude or prohibit any person from showing or proving the contrary, in any suit or proceeding to test or determine the validity of such bonds or the power of any county court, city or town council or board of trustees, or other authority, to issue such bonds; and the remedy by injunction shall also be at the instance of any tax-payer of the respective county, city or incorporated town, to prevent the registration of any bonds alleged to be illegally issued or founded on any provisions of this act."

6. That John Purcell was the presiding justice of the County Court of Jasper County, Missouri, on the 28th day of March, 1872, and continued to hold said office until the —— day of September, 1872, when he resigned; and that R. S. Merwin was a member of

the said county court in March, 1872, and until the 21st day of October, 1872, when he became and thereafter was presiding justice of said court; and these facts appear by the records of said court.

7. That the bonds in controversy were sealed with the seal of the County Court of Jasper County, affixed by the clerk and signed by the clerk, and at the same time said bonds were signed by the said R. S. Merwin, which was after he became presiding justice of said county court in October, 1872. Merwin delivered the said bonds in October, 1872, to the Union Savings Association of St. Louis, for the use of one Edward Burgess, a contractor for the building of the railroad named in the bonds, having first removed the first two coupons, and the said bonds were purchased by one William C. Wilson from said Burgess at the rate of fifty-five cents on the dollar, which was then the market value of said bonds, and the same were paid for in November, 1872, by the said Wilson, giving his check to Burgess for the amount ($27,500) on the said Savings Association, which check was paid. Neither the other justice of the county court nor the county court consented to the said delivery of the said bonds by Merwin to or for the use of Burgess. The said railroad for which the bonds issued was finished through Marion township, but the said railroad company has never complied with the condition of the vote requiring its railroad to be continued and extended through said township of Marion, from the depot at Carthage westward to some point on the Missouri River, Fort Scott and Gulf Railroad, in the State of Kansas, and there still remains about nine miles of such railroad to be constructed in Kansas.

8. That said bonds when signed, sealed and delivered as aforesaid, were antedated so as to bear date the 28th day of March, 1872, and they were never presented to the state auditor, and he never registered the same nor made any certificate thereon under the provisions of said statute approved March 30, 1872, and said bonds, as held by the plaintiff, contain no certificate of registration endorsed or written thereon.

9. That the plaintiff is a *bona fide* purchaser of said bonds and coupons for value, without actual notice of any matter of fact impairing the regularity and validity of said bonds, and without actual notice that the said bonds had been antedated so as to bear date prior to the 30th day of March, 1872.

Joseph Shippen, for plaintiff; *E. J. Montague*, for county.

DILLON, Circuit Judge; KREKEL, J. concurring.

The well known history of the issue of municipal bonds in this state, as it appears by the many cases in this court, shows that conditions imposed by law requiring a popular vote or conditions in the propositions submitted to the voters, intended to prevent fraud and to secure the actual building and completion of the roads, have been often evaded, and the bonds issued without compliance therewith. Such bonds, when negotiated for value, the courts have held to be binding. To prevent such improper or improvident issue of bonds in the future, the legislature passed the act of March 30, 1872. Laws 1872, p. 56.

The fourth section of that act provides that "*before* any bond, hereafter issued by any county * * shall *obtain validity or be negotiated,*" it must be *first* registered by the state auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were ordered to be issued, have been complied with.

In this case the bonds were signed, sealed and issued in the manner above appearing, *after* this statute went into effect, and were antedated to a date prior to the passage of that enactment. In point of fact, the conditions on which the bonds had been voted had not been fully complied with; and hence they could not have been, and were not certified by the auditor, as registered bonds. The bonds have found their way into the hands of an innocent holder for value, who did not know that the bonds bore a false date.

If the bonds bore date after the act of March 30, 1872, and had not been registered, it is plain, we think, that they would have no "*validity,*" and hence could not support an action in the hands of any person. But they are antedated, and the question is, whether they have validity in the hands of the innocent purchaser. Upon the best consideration we have been able to give, our conclusion is that the bonds can not be enforced. The case comes within the doctrine, which is well settled, that where a *statute* declares absolutely and without exception that a contract or bond or note is void, it is void into whosesoever hands it may come. This statute declares that no unregistered bond shall be valid or be negotiated. Bonds must *first* be registered. Without registration they "*obtain no validity.*" Such is a statute. A declaration that bonds shall have no validity is equivalent to declaring them void.

Is the county estopped to set up this defence? We think not. The case is to be distinguished from those decided by the Supreme Court of the United States, in which it is held that the frauds of the officers can not be visited upon the innocent bondholder, and falls within the case of Bayley v. Taber, 5 Mass. 286. In that case it was held, where a statute enacted that promissory notes, of a certain description, "made or issued" after a specified day, should be "utterly void, and no action should be sustained thereon," that it was competent to the makers of such notes, when sued upon notes bearing date *before* the day fixed by the statute, to prove that they were, in fact, made and issued *after* such day.

The principle of that case is the same, as in the case at the bar, and if that is a sound principle when applied to the individual maker of prohibited paper, it should apply with at least equal force in favor of public bodies, where one or two officers, without the consent of the others, may, as in this case, combine to evade the law—the other officers being innocent of wrongful participation.

The principle involved is one of great consequence. For illustration: Loose and general powers have been heretofore given in this state to municipalities and counties to issue such bonds. This power has been taken away by the new constitution. Can the protective provisions of that instrument be evaded and rendered useless by the mere fraudulent act of the officers of the county in antedating the bonds? If so, the power to defraud is endowed with a fearful vitality, which survives the prohibitions of the constitution, and threatens to become immortal.

BRIEF OF DEFENDANT IN ERROR.

I. *The Bonds Sued on were antedated to evade a Statute, and, hence, void in the hands of an innocent, bona fide holder.*

1st Wagner Statutes (Mo.) 243 a Sec. 4.
Facts 7th and 8th in Record.
Bayley vs. Taber, 5th Mass. 285–6.
Bridge vs. Hubbard, 15th Mass. 96.

The principle asserted in *Bayley vs. Taber*, above cited, is founded upon well considered English decisions, and it has become elementary in this country. Judge Parsons, in his very able work on Bills and Notes, cites this principle with approval, and says:

"Where notes are made void by express Statute, they cannot "become good in the hands of subsequent holders; and upon no "such note can a subsequent holder have a valid claim against the "maker."

1st Parsons on Bills and Notes—218.

Judge Parker, in announcing the opinion of the Court in *Bayley* vs. *Taber*, after laborious consideration, forcibly proclaims the principle, thus:

"*However hard the operation of the Statute* may appear to be "against persons into whose possession such notes may come *bona* "*fide* and for a valuble consideration, it is a hardship created by the "law for the public good, and the Courts of law are prohibited from "granting relief against it."

II. *Courts will not give validity to that which is made invalid by Legislative enactment.*

De Groot vs. Van Duzer—20 Wend. 388–390;

Wherein Chancellor Walworth observes:

"The first question which presents itself for our consideration "in this case, is the validity of the defence set up in what has been "denominated the first class of special pleas, or the second, third "and fourth pleas to the plaintiff's declaration. These pleas pro- "fess to be founded upon a well-settled principle of law, that no

"Court of Justice will lend its aid to enforce the performance of a "contract or agreement which is contrary to public policy, or good "morals, or *in contravention of the laws of the State.* * * * The "question is not whether such a defence is conscientious between "the parties, where perhaps the defendant himself has been more "culpable than the plaintiff who is endeavoring to enforce the con- "tract against him; for, in the language of Lord Mansfield, it is not "for the sake of the defendant that the objection is allowed in such cases, but is upon general principles of policy that Courts will not "lend their aid to any one who founds his claim or cause of action "upon an immoral or an illegal act."

And further on, the distinguished Chancellor again remarks:

"Whether it was wise or unwise in the Legislature to endeavor "to secure to the citizens of this State a safe paper currency of "known value, by prohibiting the issue of any bills, or of carrying "on any banking operations here except such as are authorized by "our own laws, is a question with which, as a court, we have noth- "ing to do. But it is the duty of Courts to endeavor to carry into "effect the declared will of the Legislature, by adhering to those "salutary principles which the wisdom of ages has found necessary "and proper to compel a due observance of the laws; and by which "principle it is made the interest as well as the duty of every indi- "vidual to abstain from any attempt to defeat the operation of the "laws, directly or indirectly."

To the same effect are the following authorities:

Crosley vs. Arkright—2d T. R. 603.

Dann vs. Dollman,—5th T. R. 641.

Bridge *et al* vs. Hubbard,—15 Mass. 96.

Authorities beyond number, elementary and adjudicated, might be cited in support of this principle, but the foregoing are deemed sufficient.

III. *The Bonds Sued on were in effect Forgeries.*

Merwin, one of the Judges of the County Court, and the County Clerk issued the bonds, without authority from the Court to issue the same, and without the consent of the other Judge of the Court, that the same should be issued.—Fact 7th.

John Purcell, and not R. S. Merwin, was the Presiding Justice of the Court on the 28th day of March, 1872,—the day of the date of said bonds.—Fact 6th.

And John Purcell continued to be the Presiding Justice of said Court until September, 1872.—Fact 6th.

Keohler vs. Iron Company.—2d Black, 715.
Dennison vs. St. Louis County.—33d Mo. 168.
Mayor vs. Erchback,—18th Maryland, 276.
Treadwell vs. Commissioners.—11th Ohio State, 183.
Clark vs. Des Moines,—19th Iowa, 209.
Jones vs. Muisback,—26th Texas, 235.

ARGUMENT.

The question is sharply presented in this case, whether the fraudulent device of antedating municipal bonds shall receive the sanction of this High Court, and by such judicial favor, to become the agency by which Statutes may be annulled, and the more solemn provisions of State Constitutions may be overthrown.

This question must challenge the serious consideration of this Court. Its gravity is not surpassed by any pending question.

That millions of dollars of municipal bonds have been issued by corrupt officials in Missouri, and other Western States, in dishonest collusion with officers and agents of Railroad corporations, is a fact with which this Court has become familiar through the numerous bond cases, brought here, in recent years, for review.

The system of swindling consisted in the organization of numerous Railroad Companies; the promise by such companies to build railroads through counties, and to cities, in consideration of subsidies in the form of municipal bonds; and by inducing the people to believe the proposed railroad would be built. In blind confidence the people were induced to authorize by vote the issue of bonds. It was then an easy task for the agents of the railroad companies to corrupt County Courts, secure the execution of the bonds, and then spirit them away to the hands of innocent, *bona fide* holders. This done, the construction of the proposed railroad was abandoned, the swindlers found a quiet retreat, wherein to enjoy in ease and luxury the fruits of their rascality.

To arrest this scheme of swindling, and enforce the building of proposed railroads, when subsidies in the form of bonds were given,

"Court of Justice will lend its aid to enforce the performance of a "contract or agreement which is contrary to public policy, or good "morals, or *in contravention of the laws of the State.* * * * The "question is not whether such a defence is conscientious between "the parties, where perhaps the defendant himself has been more "culpable than the plaintiff who is endeavoring to enforce the con- "tract against him; for, in the language of Lord Mansfield, it is not "for the sake of the defendant that the objection is allowed in such cases, but is upon general principles of policy that Courts will not "lend their aid to any one who founds his claim or cause of action "upon an immoral or an illegal act."

And further on, the distinguished Chancellor again remarks:

"Whether it was wise or unwise in the Legislature to endeavor "to secure to the citizens of this State a safe paper currency of "known value, by prohibiting the issue of any bills, or of carrying "on any banking operations here except such as are authorized by "our own laws, is a question with which, as a court, we have noth- "ing to do. But it is the duty of Courts to endeavor to carry into "effect the declared will of the Legislature, by adhering to those "salutary principles which the wisdom of ages has found necessary "and proper to compel a due observance of the laws; and by which "principle it is made the interest as well as the duty of every indi- "vidual to abstain from any attempt to defeat the operation of the "laws, directly or indirectly."

To the same effect are the following authorities:

Crosley vs. Arkright—2d T. R. 603.

Dann vs. Dollman,—5th T. R. 641.

Bridge *et al* vs. Hubbard,—15 Mass. 96.

Authorities beyond number, elementary and adjudicated, might be cited in support of this principle, but the foregoing are deemed sufficient.

III. *The Bonds Sued on were in effect Forgeries.*

Merwin, one of the Judges of the County Court, and the County Clerk issued the bonds, without authority from the Court to issue the same, and without the consent of the other Judge of the Court, that the same should be issued.—Fact 7th.

John Purcell, and not R. S. Merwin, was the Presiding Justice of the Court on the 28th day of March, 1872,—the day of the date of said bonds.—Fact 6th.

And John Purcell continued to be the Presiding Justice of said Court until September, 1872.—Fact 6th.

Keohler vs. Iron Company.—2d Black, 715.
Dennison vs. St. Louis County.—33d Mo. 168.
Mayor vs. Erchback,—18th Maryland, 276.
Treadwell vs. Commissioners.—11th Ohio State, 183.
Clark vs. Des Moines,—19th Iowa, 209.
Jones vs. Muisback,—26th Texas, 235.

ARGUMENT.

The question is sharply presented in this case, whether the fraudulent device of antedating municipal bonds shall receive the saction of this High Court, and by such judicial favor, to become the agency by which Statutes may be annulled, and the more solemn provisions of State Constitutions may be overthrown.

This question must challenge the serious consideration of this Court. Its gravity is not surpassed by any pending question.

That millions of dollars of municipal bonds have been issued by corrupt officials in Missouri, and other Western States, in dishonest collusion with officers and agents of Railroad corporations, is a fact with which this Court has become familiar through the numerous bond cases, brought here, in recent years, for review.

The system of swindling consisted in the organization of numerous Railroad Companies; the promise by such companies to build railroads through counties, and to cities, in consideration of subsidies in the form of municipal bonds; and by inducing the people to believe the proposed railroad would be built. In blind confidence the people were induced to authorize by vote the issue of bonds. It was then an easy task for the agents of the railroad companies to corrupt County Courts, secure the execution of the bonds, and then spirit them away to the hands of innocent, *bona fide* holders. This done, the construction of the proposed railroad was abandoned, the swindlers found a quiet retreat, wherein to enjoy in ease and luxury the fruits of their rascality.

To arrest this scheme of swindling, and enforce the building of proposed railroads, when subsidies in the form of bonds were given,

the Legislature of the State of Missouri, passed a law, which went into effect on the 30th day of March, 1872, the fourth section of which reads, thus:

SEC. 4. "Before any bond hereafter issued by any county, city, "or incorporated town, for any purpose whatever, shall obtain val- "idity, or be negotiated, such bond shall first be presented to the "State Auditor, who shall register the same in a book or books "provided for that purpose, in the same manner as the State bonds "are now registered, and who shall certify by endorsement on such "bond that all the conditions of the laws have been complied with "in its issue, if that be the case, and, also, that the conditions of the "contract under which they were ordered to be issued have been "complied with, and the evidence of that fact shall be filed and pre- "served by the Auditor; but such certificate shall be *prima facie* evi- "dence only of the facts therein stated, and shall not preclude or "prohibit any person from showing or proving the contrary in any "suit or proceeding to test or determine the validity of such bonds, "or the power of any County Court, city or town council, or board of "trustees, or other authority, to issue such bonds; and the remedy "by injunction shall also lie at the instance of any tax-payer of the "respective county, city, or incorporated town, to prevent the reg- "istration of any bonds alleged to be illegally issued or founded un- "der the provisions of this act."—*1st vol. Wagner Statutes, (Mo.) p. 243, a. Sec. 4—Session Acts, 1871-2, p. 57, Sec. 4.*

It was supposed that this stringent law was a sufficient safeguard to the tax-payers against the further issue of bonds to the railroad corporations, whose sole purpose was to secure the issue of bonds, and—not to build railroads.

But, it was found that the same scheming rascality, which had obtained millions of fraudulent bonds already, was attempting the evasion of this law by "pursuading" and "inducing" the officials of County Courts and City Governments, to antedate their bonds, as was done in the case at bar, without the railroad being built.

The disastrous results to the tax-payers of the litigation attending their efforts for relief from the fraudulent bonds issued as I have indicated, so alarmed the people of Missouri, that, when a convention was called for the purpose of making a new State Constitution, an emphatic demand was made for a provision which neither ingenuity, corruption, nor bribery could evade or nullify. This demand

resulted in the incoporation of the following provision in the New Constitution, which was adopted by a vote of the people of the State, approacing unanimity, to-wit:

Sec. 47, (Art. 4th.)

"The General Assembly shall have no power to authorize any "county, city, town or township, or other political corporation or "subdivision of the State now existing, or that may be hereafter es- "tablished, to lend its credit, or to grant public money, or "other thing of value in aid of, or to any individual, association or "corporation, whatsoever, or to become a stockholder in such cor- "poration, association, or company."

It was this "well known history of the issue of municipal bonds in this State," and the efforts of the people by legislative enactment and Constitutional provision, to free themselves from the fraud and corruption, which were threatening abject bankruptcy, that prompted the able and distinguished Circuit Judge (concurred in by the equally able and faithful District Judge) to the following observations in delivering the opinion of the Court at the trial of this case, to-wit:

"The principle involved is one of great consequence. For il- "lustration: Loose and general powers have heretofore been given "in this State to municipalities and counties to issue such bonds. "This power has been taken away by the New Constitution. Can "the protective provisions of that instrument be evaded and ren- "dered useless by the mere fraudulent act of the officers in anteda- "ting the bonds? If so, the power to defraud is endowed with fear- "ful vitality, which survives the prohibitions of the Constitution, "and threatens to become immortal."

Judges Dillon and Krekel were familiar with this "well known history." They saw the "fearful vitality" with which the "power to defraud" was sought to be "endowed," and they addressed themselves with unusual consideration to this case, the result of which was the finding of facts here shown in the record, and a judgment thereon against the validity of the bonds.

This case furnishes an illustrative chapter in that "well known history." Recurring to the facts as found by the Circuit Court, it appears that one of the conditions upon which the County Court was authorized to issue the bonds, was:

"That the Railroad of said Company (Memphis, Carthage and "Northwestern) be continued through said Township of Marion,

" * * * * to some point on the Missouri River, Ft. Scott and " Gulf Railroad, in the State of Kansas, within nine months from " the first day o March, 1872."—*Fact 2d—Subdivision 3d.*

The case was tried in April, 1876, and yet the road, according to the finding just recited, was not then completed; and I may be pardoned for mentioning the fact, outside of the record, that the Memphis, Carthage and Northwestern Railroad Company never did complete its road to the Gulf road—that long since that corporation passed out of existence.

Another illustrative fact—(Fact 7th)—is:

" Neither the other justice of the County Court, (there was but " one other) nor the County Court, consented to the said delivery of " said bonds by Merwin to or for the use of Burgess."

The finding, also, discloses the fact that these bonds were signed by R. S. Merwin, as Presiding Justice, and the seal of the Court affixed in October, 1872, and that the said bonds were antedated, and made to bear date, March 28th, 1872; and we have, also, the further fact that on the 28th of March, 1872, John Purcell was the Presiding Justice of said County Court.

These facts grouped together are:

That a condition precedent to the issue of these bonds had not been complied with nearly four years after the condition should have been performed;

That Merwin, one of the County Judges, issued the bonds without any action authorizing him so to do by the County Court, and without the consent of his associate of the County bench.

That by signing these bonds as Presiding Justice, and antedating them to the 28th day of March, 1872, Merwin represented himself on said bonds as being the Presiding Justice on said 28th day of March, when in fact John Purcell was the Presiding Justice at that time, and continued to be the Presiding Justice until September following.

Does the law furnish relief from such gross and manifest violations of duty and honest rectitude? If not, wherein is the weakness—wherein the fault? Not in the absence of legislative enactment, or Constitutional prohibitions, for the Legislature of Missouri, and the people by Constitutional provision, have taken every precaution possible to guard against such fraud as the issue of the bonds in controversy so strikingly represents. If the people, in the exercise of

their legislative authority, and in the exercise of whatever of sovereignty belongs to the people of the State, have failed to place an insurmountable barrier in the pathway of that avalanche of fraud and corruption which was bearing them on to irretrievable bankruptcy, they have failed, not from honest effort, but from the refusal of Courts to give effect to their enactments.

Fortunately the Courts of this country have never failed to uphold the law, even though the innocent victim of fraudulent paper was made to suffer for his credulty. Judge Parker, in the well considered case of *Bayley* vs. *Taber*, 5th Mass. 285—announces the correct principle, in passing upon the admissability of evidence to prove the true date of the issue of the paper.

He pertinently remarks:

"To reject the proofs of these facts, because the defendants are "the original promisers, and because plaintiffs may be supposed to "be innocent holders of the notes for valuable considerations, would "be, to all intents and purposes, to defeat the operation of the Stat-"ute, and would amount to a judicial repeal of an act of the Legis-"lature."

Plaintiff in error relies upon the case of *County of Moultrie vs. Savings Bank*, 92, U. S. (2 Otto.) 631.

That case turned upon the question whether the inhibition of the Constitution of Illinois upon the power of Counties to contract with Railroad Corporations, nullified the contract of Moultrie County made with the Decatur, Sullivan and Mattoon Railroad Company, before the adoption of the Constitution. The validity of the bonds rested upon the validity of the contract. The bonds were held valid by a majority of the Court, for the reason that the provision of the the Constitution above mentioned did not destroy the contract made between the County and the Railroad Company. There was no point made upon any infirmity in the bonds themselves.

In the case at bar the question is upon the infirmity in the bonds themselves, and not upon the validity of the contract. And the infirmity complained of is not an imperfect or irregular exercise of power by the County Court, but an evasion and violation of a Statute.

The power of County Courts to issue "valid," "negotiable" bonds, without registration in the Auditor's office, was taken away, and rescinded, by the law of March 30th, 1872. The fact stands un-

challenged that the bonds here sued on were issued by Merwin, one of the Judges, and the clerk of the county court, without the assent of the County Court, in October, 1872, and the question to be answered by the decision in this case is, whether one of the Judges and the Clerk of the County Court, could invest the County Court with power to issue "valid," "negotiable" bonds by the device of antedating them to a time prior to the enactment of the Statute. Hence, the case of the *County of Moultrie* vs *Savings Bank* is not in point, and furnishes no analogous principle for guidance in this case. Much nearer in harmony with the principle contended for by defendant in error in this case, is the principle sustained by a unanimous Court in the case of the *Town of Concord* vs. *Portsmouth Savings Bank*, 92 U. (2d Otto) 625. In the latter case the bonds were issued by the Town of Concord under the assumed authority supposed to have been conferred by the act of the Legislature of Illinois, of March 7th, 1867; the recitals on the face of the bonds refer directly to that act as the source of authority for issuing the bonds; a popular election held on the 20th of November, 1869, had authorized the town board to make the donation represented by the bonds; and on the 20th of June, 1870, the Railroad Company filed its acceptance of the donation with the town Clerk. The Constitution of Illinois, prohibiting Counties, &c., from taking stock in, or making donations to, any railroad or private corporation, went into effect July 2d, 1870; and the bonds were issued on the 9th and delivered to the Railroad Company on the 17th of October, 1871, and the question, as set forth in the opinion of the Court, was "whether that Statute did in reality give to the Supervisor and Clerk of the town power to execute and deliver town bonds on the 9th of October, 1871." Upon this question the unanimous opinion of the Court was that the law of March 7th, 1867, was nullified by the Constitution which took effect July 2d, 1870, and that the authority to make donations to railroad corporations, and issue bonds in payment thereof, did not exist in October, 1871; hence, the bonds issued in 1871, were void.

As an analogous principle, it may be asserted in the case at bar, that the question is, whether the County Court of Jasper County, did in reality have the power to issue valid, negotiable bonds in October, 1872, *without the certificate of registration by the State Auditor, prescribed by that act.*

The act of March 30th, 1872, of the Missouri Legislature, was in its manifest import, a restriction upon the power of County Courts

to issue valid, negotiable bonds. And the question recurs, whether the County Court could evade this restriction upon its power, and invest itself with unlimited authority by the device of antedating its bonds. If not, then the bonds involved, like the bonds in the *Town of Concord vs. Savings Bank*, are void; if so, then the "power to defraud is endowed with fearful vitality, and threatens to become immortal."

Passing abruptly from the question under consideration, I call attention to a point made in the argument of the case in the Circuit Court, and which I presume will be pressed upon the attention of this Court; viz: That the bonds in controversy, are *Township* bonds, and, therefore, these bonds do not fall within the restrictive provisions of the act of March 30th, 1872—that that act only requires bonds issued by counties, cities and incoporated towns to be registered before they should have validity and be negotiable.

This argument is an evident refuge from a "stress of weather," and it concedes the fact that if these bonds are county, city or incorporated town bonds, registration in the Auditor's office is essential to give them validity.

Several questions of moment spring up in response to this argument. It is within the range of judicial notice that a Township in the State of Missouri does not possess so much as a shadow of corporate existence—not so much as a road district, wherein there is an "overseer," or "pathmaster," clothed with authority to "warn the hands to work the road" once a year. A Township is but a voting precinct, the boundaries of which are defined by the County Court, to advise the voters on election day of the place where they may cast their ballots. There exists not so much as the dim shadow of a Township officer. Even the judges and clerks of elections are appointed by the County Court, and paid for their services out of the County Treasury. Therefore, if the bonds here in litigation are not county, city, or incorporated town bonds, then it must be admitted that they are the bonds of a territory which has not the vestage of contracting power; and, springing not from contracting authority, they are destitute of vitality.

If, nevertheless, Township bonds possess any vitality, they fall within the plain provisions of section four, of the act of March 30th, 1872. That section provides that the certificate of registration,

which must appear upon the bonds before they "shall obtain validity, or be negotiated," "Shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceeding to test or determine the validity of such bonds, or the power of any County Court, city or town council, or board of trustees, *or other authority,* to issue such bonds."

Evidently every possible bond to be issued under any authority given by the Legislature is included within the language just quoted. But the point contended for by plaintiff in error runs to such absurdity as to preclude further serious consideration.

There is, however, a question of sufficient moment to claim attention in this connection, which seems hitherto to have been overlooked in Township bond cases. The act of March 23d, 1868, under which is claimed the authority for County Courts to issue bonds on behalf of Townships, specifies "*municipal Townships, for election purposes.*"—(1st vol. Wagner Stat., p. 313, sec. 51.) It will be conceded that this law conferred upon County Courts the power to contract on behalf of "municipal townships for election purposes," but no other townships. Now, if it occurs as a matter of fact, that there did not exist then, nor have there existed since, "municipal townships for election purposes" in the State of Missouri, then the law in question conferred no authority upon County Courts to contract on behalf of anything.

Out of respect for the intelligence of the Legislature of Missouri, we must suppose that when they used the word "municipal" they understood its signification. Referring to our Lexicon, we find "municipal" is derived from *municipia,* and turning to our historian, for special guidance in definition, it is found that in ancient Rome there were three divisions of civil government, viz: *Prefectures,* whose people were subjected to the burdens of Government without the privileges of Roman citizenship, or self-government; *Colonies,* whose people constituted a sort of vassalage, or subordinate appendage to the governing authority; and *Municipalities,* or cities and towns, embracing corporate authority or governing functions. Hence, "municipal" implies functions and powers capable of contracting and being contracted with.

The history of the origin and powers of municipalities, is too extensive for recital here; and I submit the point by refering to

the following authorities, where the question is elaborately examined:

2d Kent, 268, and Note.
Dr. Liddell, Rome, Chap. 27, sec. 8.
People vs. Morris, 13 Wend. 325, per Nelson.
M. Guizot's Hist., Civ. Lect. 7th.
" " " " " 2d.

It is possible that the Court will not feel called upon to consider the point I have suggested, nor examine the authorities cited, for the reason, that the case will be decided upon the first proposition submitted, viz: *That the Bonds having been antedated to evade the law are void in the hands of whomsoever they may be found.* But should a case arise wherein the primary question is, whether the law of March 23d, 1868, conferred upon County Courts' authority to make contracts on behalf of election districts, when the law specified "Municipal Townships for election purposes," it will doubtless be held by this Court, that some municipal, or corporate power, must appear, before a basis for the supposed authority can be found. In other words, that "Municipal Townships" must have, within the meaning of the Legislature, some elements of municipality, before the law finds its application.

With these observations, intentionally condensed, the case is submitted, in the conviction that the "question is of great consequence," and that its serious consideration must result in the affirmance of the Circuit Court, and the relief of the people of Jasper County from a serious wrong attempted to be imposed by the treachery of trusted officers, in collusion with dishonest Railroad Agents. The people whose interests are involved in this case scorn the imputation of repudiation. They believe every honorable obligation should be paid. They claim to defend themselves against fraud and rascality.

E. J. MONTAGUE,
Attorney for Defendant in Error.

No......

IN THE

Supreme Court of the United States,

October Term, 1879.

CHARLES E. ANTHONY,
Plaintiff in Error,
vs.
THE COUNTY OF JASPER.

In Error to the
Circuit Court of the United States
for the Western District
of Missouri.

Brief by ALEX. GRAVES of Counsel for Defendant in Error.

1879:
INTELLIGENCER NEWS, BOOK AND JOB POWER PRINT,
LEXINGTON, MO.

No......

IN THE

Supreme Court of the U. S.,

October Term, 1879.

CHARLES E. ANTHONY,
Plaintiff in Error,
vs.
THE COUNTY OF JASPER.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Brief by ALEX. GRAVES of Counsel for Defendant in Error.

The bonds in question recite that they were issued by virtue of an act of the General Assembly of Missouri, entitled "An act to facilitate the construction of railroads in the state of Missouri, approved March 23d, 1868, and it is the only act claimed as authority for their issuance. If this act is void, the bonds issued thereunder are also void.

The act (Session Acts 1868, page 92, 93, section 1,) provides that "If it shall appear from the returns of such election that not less than two-thirds of the qualified voters of such township, VOTING at such election, are in favor of such subscription, it shall be the duty of the County court to make such subscription in behalf of the township," &c., &c. The constitution of Missouri, in force at the passage of this act, by section XIII, of article XI, provides that "The credit of the state shall not be given or loaned in aid of any person, association or corporation; nor shall the state hereafter become a stockholder in any corporation or association," and by section XIV of the same article it declares that "The General Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless TWO-THIRDS OF THE QUALIFIED VOTERS of such county, city or town, at a regular or special election to be held therein, shall assent thereto." General statutes of Missouri 1865.

Upon the ground that this act contravenes the constitution in the respect herein named, the Supreme court of Missouri, in the only cases wherein that point has been raised and decided, has twice held that the act is void. Webb vs. Lafayette county, 67 Mo., 354-371. State ex rel Woodson vs. Brassfield, 67 id. 332-345. (Both decided in 1878.)

These decisions will be followed by this court.

It is decided in the Town of South Ottawa vs. Perkins, 94 United States Reports, page 267, in reference to this very question, involving a negotiable municipal bond, to be declared by the thirty fourth section of the judiciary act as a fundamental principle "that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply. *And this court has always held that the laws of the states are to receive their authoritative construction from the state courts, except where the federal constitution and laws are concerned, and the state constitutions, in like manner, are to be construed as the state courts construe them. This has been so often laid down as the proper rule, and is, in itself, so obviously correct, that it is unnecessary to refer to authority. * * * As a matter of propriety and right the decision of the state courts on the question as to what are the laws of the state, is binding upon those of the United States.*"

In the case just above cited, the bond being negotiable and in the hands of an innocent purchaser for value, was held void, because the act authorizing its issuance was passed, the senate journal of the general assembly of Illinois not containing an entry of its passage. Notwithstanding it appears from the dissenting opinion in that case "that this law was enrolled, signed by the speaker of the two houses; approved by the governor; deposited in the office of the secretary of state; published by him, with the requisite certificate, among the laws at the session of the legislature, in 1857; acquiesced in by the people of the state as a valid law for more than thirteen years after its publication; accepted and acted upon by

the inhabitants of South Ottawa in October, 1866, when they voted under it for a subscription to the stock of the railroad company, and authorized the issue of the bonds of the township in payment; recognized as a valid and existing law by the legislature of the state March 27, 1869, and April 20, 1860, when laws were passed referring to it and amending it; and finally acted upon by the officers of the township, when, in obedience to the vote of the inhabitants, they subscribed to the stock of the railroad company, and issued the bonds authorized by the act in payment." Town of South Ottawa vs. Perkins, supra 273. And id. 276, the dissenting opinion says that to "admit proof of the lack of an entry on the senate journal of the passage of the act would ignore a principle of COMMERCIAL honor upon which we have made a long line of decisions."

Now here was a failure to comply with what might be called a formal requirement of the constitution of Illinois in the passage of this act; but from all the circumstances detailed in the above extract of the dissenting opinion no doubt can be entertained that the act was in FACT passed. However, this court in compliance with a rule which is coeval with the constitution of the government, and which, as Justice Bradley said, was a fundamental principle thereof, enjoined by the 34th section of the judiciary act, held the aid act and bonds void in order to conform to the decision of the Supreme court of Illinois. How much more powerfully does principle and reason demand that the same salutary rule should be applied to the case at bar, where more than the mere formal and directory demands of the constitution have been ignored? Here is an express prohibition upon the state, disabling it in its corporate capacity to loan its aid in any manner to corporations by section XIII, and by section XIV the legislature is expressly and peremptorily enjoined to pass no act authorizing any municipality to make such subscription, unless upon the distinct condition that the act shall require the assent of two-thirds of the qualified voters of such municipality. By the provisions of this act if only 15 out of 15,000 of the qualified voters of the municipality should attend the election and 10 of the 15 should assent to by voting in favor of the subscription, the authority to subscribe would be as complete as if 10,000 of the 15,000 qualified voters of the municipality had assented thereto, the constitution to the contrary notwith-

standing. If this act can be sustained, upon the same principle the General Assembly might as well pass a law abrogating section VI of the same article of the constitution, which declares that "No money shall be drawn from the treasury but in consequence of appropriations made by law."

The doctrine as enunciated by the decision in Town of South Ottawa vs. Perkins, has very recently been reaffirmed by this court, in a decision rendered at the October term, 1879, (not yet reported) substantially as follows in case No .526, Geo. B. Fairfield, P. E., vs. County of Gallatin: in error to the Circuit court of the United States for the southern district of Illinois. This was a suit upon coupons of a certain series of bonds issued by the county of Gallatin, Illinois, in October, 1870, to the St. Louis & Southeastern Railroad Co., as a donation to assist in the construction of that road. The defense set up was, in substance, that in consequence of a provision of the new state constitution, which went into effect July 2, 1870, the authority to issue and deliver the bonds had ceased to exist. The question presented is, whether a donation to the railroad company, legally authorized and approved by a majority of the legal voters of a county prior to the adoption of the new state constitution is rendered invalid by the prohibition of such donations contained in that constitution? In the case of the town of Concord vs. the Portsmouth Savings Bank [92 U. S. 625], this court was called on to give construction to the section of the Illinois state constitution now in question, and it then held that donations by counties to railroads were prohibited by it now; that they could not lawfully be made after July 2, 1870, even although they had been authorized by a prior statute and by a vote of the people of the county. It now appears, however, that prior to the above decision by this court, the Supreme Court of Illinois, in construing this same section, had decided that donations, if sanctioned by popular vote before the adoption of the constitution, are not prohibited by it. It is an established rule of this court that it will follow the decisions of state courts in constructions of their own constitutions and statutes when such decisions are brought to its notice. Green vs Neal's Lessee, 6 Peters, 291. This court, therefore, changes its own decision as rendered in Concord vs. Portsmouth Savings Bank, and adopts that construction of the Illinois consti-

tution, declared by the courts of that state, 74 Ill., Rep. 277. The judgment of the Circuit court is reversed, and the record remitted, with instructions to give judgment for plaintiff below on the finding made.

These decisions are the last utterances of this court as to the force and effect of adjudications by the state Supreme courts construing state statutory and constitutional law where commercial paper is involved, and would seem to restore the ancient rule of comity that had been disturbed by the doctrine announced in Olcott vs. Supervisors, 16 Wallace, 678 and Pine Grove vs. Talcott, 19 Wallace, 666.

The cogency of this rule of comity, as held by this court, is very forcibly illustrated in the criminal case of Boyd vs. The State of Alabama, 94 U. S. Reports 646 and 650. On the 10th of October, 1868, the legislature of Alabama granted authority to certain persons to carry on a lottery. Before this act was passed the general laws concerning misdemeanors prohibited lotteries, under penalties ranging from $100 to $2,000, and that law remained unrepealed. The act of October, 1868, giving the authority to persons therein named to carry on the lottery was repealed by an act dated March 1871. The defendant, Boyd, was one of the grantees in the act of October, 1868, and had complied with its provisions in regard to the payment of certain sums of money into the state treasury. After the repealing act of March, 1871, he was indicted for carrying on the lottery business under the act of October, 1868, upon the ground that his permission so to do had been revoked by the act of March, 1871, upon appeal to the Supreme court of Alabama. That court held the repealing act void for unconstitutionality, inasmuch as the act of October, 1868, by its terms amounted to a contract which could not be impaired by subsequent legislation. The defendant was upon that indictment acquitted, and continued to operate under the act of October, 1868, when he was again indicted and convicted, and upon appeal to the Supreme court of Alabama, that conviction was sustained upon the ground that the act of October, 1868, giving the defendant permission to engage in lottery was unconstitutional, by reason of its misleading title, and that so being void, it afforded no immunity to him. This court, when called upon to review that decision, said :

*"We cannot refuse to give effect to that decision. It is the province of the Supreme Court of the state to construe its own constitution and laws; and when it decides that one of its own laws is not authorized by its constitution, it is not for us to deny the correctness of the decision, when there is no evasion in the way of federal authority. * * * If he [the defendant] has been mislead by previous adjudications of the State courts, his relief from the present judgment must be sought from the clemency of the executive. This court can afford him none. 94 U. S. Reports, supra, p. 649.*

Apply the principles declared in these three most recent decisions of this court upon this question, and the conclusion would seem inevitable that the decisions of the Supreme court of Missouri in Webb vs. Lafayette county, and State ex rel Woodson vs. Brassfield, 67 Mo., SUPRA, would lead this court to restore its decision as made in Harshman vs. Bates county 92 U. S. Reports, 569, wherein this court EX MERO MOTU construed the Missouri "Township Aid Act" to be void as contravening the state constitution in the respects herein named.

But the decisions in South Ottawa vs. Perkins, Boyd vs. the State of Alabama, and Fairfield vs. the County of Gallatin, have peculiar force in the case at bar, because, in no case in the Missouri Supreme court, had the objection here urged been made or considered by the court.

In County of Cass vs. Johnston, 95 U. S. Reports, 366, the chief justice delivering the opinion for the majority of this court reversing the construction put upon the "aid act" in Harshman vs. Bates County SUPRA, referred to the State vs. Linn County, 44 Mo., 504, and used the following language:

"It was contended that the act was repugnant to article 11, section 14 of the constitution, because the bonds to be issued were bonds of the County and not of the Township, and the voters of the County had not given their assent. But the court held they were the bonds of the Township. Following this are the cases of Ranney vs. Baeder, 50 Mo., 600 Md. Pike vs. Pen, 51 id., 63, decided in 1872. State vs. Cun-

ningham, 51 id., 479. Ruby vs. Shain, 54 id., 207, decided in 1873. State vs. Bates County, 57 id., 70, decided in 1874. State vs. Clarkson, 59 id., 149, decided in 1875. State vs. Daviess County, 64 id., 31, and State vs. Cooper County, id., 170, decided in 1875—in all of which the act was, in some form, brought under consideration, and in no one was there a suggestion of its unconstitutionality, by either court or counsel. It is true that the objection now made to the law was in no case presented or considered."

And to the same effect is the language of the Supreme Court of Missouri in Webb vs. Lafayette County, 67 Mo., SUPRA 368, wherein that court declares "If the constitutionality of this act had been heretofore fully presented and considered, and declared valid, thereby establishing a rule of property, we would hesitate long before overturning it or unsettling it in any degree. We think this has not been done, and the case on which this claim is based is that of the State ex rel vs. Linn County Court, 44 Mo., 504, in which the points now before us were neither made nor considered in that or any other case."

So it is that both the Supreme Courts of the United States and of the state of Missouri concur as to the fact that in no case decided by the State Court prior to Webb vs. Lafayette County and State ex rel Woodson vs. Brassfield (1878) SUPRA, was this point made or decided with reference to the state constitution. This being so, the fact that in the previous cases in Missouri the 'aid act' "was, in some form, brought under consideration," as said in Johnston vs. Cass County SUPRA, goes for naught in view of the language of the Supreme Court of the United States in Boyd vs. Alabama, SUPRA, 94 U. S. Reports, 648, as follows. "Courts seldom undertake in any case to pass upon the validity of legislation where the question is not made by the parties. Their habit is to meet questions of the kind when they are raised, but not to anticipate them. Until then they will construe the acts presented for consideration, define their meaning and enforce their provisions. The fact that acts may, in this way, have been often before the court is never deemed a reason for not

subsequently considering that question when presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the act, because that point might have been raised and determined in the first instance."

Is it true that although Boyd was so misled by previous adjudications of the Supreme Court of Alabama as to be held guilty in the last case for the performance of an act deemed by that court previously to be innocent, and that the stringency of this rule of comity would not permit this court to afford him relief, and yet in the civil case of a bondholder the same relief shall be granted notwithstanding the rule?

Can that be the rule of law in determining the guilt or innocence of a party involved under a criminal code, having, as his protection, an act of the legislature which had previously been held by the Supreme Court of the State to be a contract between him and the state, authorizing him to do the very thing for which he was, in the next case, pronounced guilty because his grant was held void for unconstitutionality, and yet will it be seriously contended that a bondholder's rights, in a civil case, are not to be subject to the same regulation?

If so, then Blackstone's doctrine, that law is an "UNIVERSAL rule," seems to have exploded.

Here is an act so confessedly repugnant to the provisions of the state constitution, that this court, without any state decision in the premises, did not hesitate to declare that if it could be upheld then "the manifest intention and spirit of the constitution would be ignored." And this act has been recently twice declared by the state court invalid for unconstitutionality in cases wherein the point was, for the first time, made, and we respectfully submit that under the rule in South Ottowa vs. Perkins, Boyd vs. Alabama and Fairchild vs. County of Gallatin, this court should follow the State Supreme Court decisions, and declare this act null as violative of the state constitution, and the bonds issued thereunder void for want of power in the county court to subscribe and issue them.

In conclusion it may be proper to make further allusion to the case of County of Cass vs. Johnston, 95 U S. Reports SUPRA, wherein the majority of this court reversed its ruling in Harshman vs. Bates County, upon the constitutional point herein involved. In Cass County vs. Johnston, 95 U. S. Reports, page 365, the following language is used in the very beginning. "Now, however, the question is directly presented whether the provisions of the constitution and the statute are not substantially the same. On the one hand it is contended that the constitution requires the actual vote of two-thirds of the qualified voters of the township in favor of the subscription ; and on the other that the requisite assent is obtained if two-thirds of those voting at the prescribed election shall vote to that effect."

In addition to the fact that the point had never been raised or decided up to the rendition of the judgment of this court in Cass County vs. Johnston supra, and so declared by this court as well as the state Supreme Court in Webb vs. Lafayette County, and State ex rel Woodson vs. Brassfield, 69 Mo. supra. It is respectfully submitted that the reason why the point had not been made and decided by the State Supreme Court as given in Cass County vs. Johnston *supra*, would not seem sufficient in view of the decisions of the State Court up to that time.

In Cass County vs. Johnston, 95 U. S Reports, page 366, this court says: "It is true that the objection now made to the law was in no case presented is explained by the fact that in other cases a construction ADVERSE to such a position had been given to language similar to that employed in the constitutional prohibition." Now, this court, for the purpose of ascertaining what the language of the state constitution means when it declares that "The General Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, asssociation or corporation, unless two-thirds of the qualified voters of such county, city or town at a regular or special election, to be held therein, shall assent thereto," has taken recourse to the decisions of the Supreme Court of Missouri.

State vs. Winkelmeier, 35 Mo., 103, decided in 1864, construing (not a constitutional provision) but an act of the general assembly; and State vs. Mayor of St. Joseph, 37 Mo., 270,

(also construing not a constitutional provision, but merely an act of the general assembly), and State vs. Binder, 38 Mo., 450 (also construing not a constitutional provision, but a mere act of the general assembly), are the cases mainly relied on in the decision in Cass county vs. Johnston. *supra.*

State vs. Winkelmeier, 35 Mo., *supra*, was decided before any provision of law, either by constitution or act of the general assembly, required registration of voters. See Missouri constitution and code of 1855; also, Cass county vs. Johnston, 95 U. S. Reports, 366.

State vs. Binder, 38 Mo., *supra*, was decided in construing an act of the Missouri legislature, approved March 4th, 1857, long before there was any constitutional or statutory provision requiring registration of voters in Missouri.

In State ex rel Bassett, vs. Mayor of St. Joseph, 37 Mo., 270, supra, the construction was upon an act of the general Assembly of Missouri, dated the 19th of December, 1865. This case comes near to (but not within) the time prescribed by the law of Missouri for the registration of voters, as will be readily seen by the following considerations:

The constitution which went into effect on the Fourth day of July, 1865, by Sect. IV., of Article II., on suffrage, provided as follows: "The General Assembly shall immediately provide by law for a complete and uniform *registration* by election districts of the names of qualified voters in this State; *which registration shall be evidence of the qualification of all registered voters to vote at any election thereafter held; but no person shall be excluded from voting at any election on account of not being registered until the General Assembly shall have passed an act of registration, and the same shall have been carried into effect; after which no person shall vote unless his name shall have been registered at least ten days before the day of the election; and the fact of such registration shall be no otherwise shown than by the register.*"

Under this provision of the Constitution, the Missouri legislature on the 16th day of December, 1865 (see General Statutes 1865, page 905, section 1) provided that "on or before the *20th day of February, in the year 1866*, the governor shall appoint in each county, except the county of St. Louis, one competent and discreet citizen, who is a qualified voter, a s

a supervisor of registration in such county, who shall be the President of the Board of Appeals and Revision as hereinafter provided. He shall keep a record of all his acts and proceedings, and by the 31st section of the same act, page 909, of the General Statutes of 1865, the appointment of the registrar for St. Louis county was to be made "on or before the first day of June, 1866, as prescribed by section one of this act."

Now by the above provision of the constitution the number of the qualified voters was to be determined by the *registrar's list* and not by the number of voters *voting* at the election, and the first and only act of the General Assembly passed upon that subject is the one above referred to which required the governor by section one, above quoted," to appoint registrars for the State at large in each co[illegible] before the *20th day of February, in the year 1866*

But in State ex rel. Basset vs. Mayor of St. [illegible] Mo., 271, the construction was upon an act, dat[illegible] *1865*, upon an election held the *13th of January, 1866*, which was before the time for appointment of registrars accrued. Therefore, so far as the reasoning of this court in Cass county vs. Johnson *supra*, for the purpose of ascertaining whether the Statute of March 23d, 1868, does not substantially comply with the requirements of the sections of the constitution hereinbefore first quoted, is based upon the three cases of State vs. Winkelmeirer, 35 Mo., *supra*, and State vs. Mayor of St. Joseph, 37 Mo., *supra*, and State vs. Binder, 38 Mo., *supra*, it would seem that this court has been misled as to the time when the legislature under the clause of the constitution concerning registration provided for the test of the qualified voters to be found in the registration lists.

The next and fourth case referred to in Cass county vs. Johnson *supra*, is that of State vs. Sutterfield, 54 Mo., 391.

In this case the construction of an act of the Missouri legislature under the constitution wherein a similar provision of the constitution to that now under consideration, was involved for the first time came up in the Missouri Supreme Court. An examination of the section of the constitution construed therein, and an examination of the case itself will conclusively prove how this honorable court has been misled and imposed upon in order to procure the decision in

Cass County vs. Johnston, *supra*, reversing Harshman vs. Bates County. In State vs. Sutterfield, 54 Mo., *supra*, the following section of the constitution of 1865 was under consideration, namely: Section XXX of article IV of the constitution of 1865. "The General Assembly shall have no power to remove the county seat of any county, unless two-thirds of the qualified voter of the county, at a general election, shall vote in favor of such removal."

Now in Cass County vs. Johnston, 95 U. S. Reports, page 368, this court says: "In State vs. Sutterfield, 54 Mo., 391, the question was as to the construction of another clause in the constitution; AND THE DECISION WAS PLACED EXPRESSLY ON THE GROUND OF A DIFFERENCE BETWEEN THE TWO PROVISIONS." There is not in the case of State vs. Sutterfield, 54 Mo., *supra*, from first to last any allusion whatever to section [redacted], article XI of the constitution now under consideration, and hence that decision could not be, and was not "placed expressly on the ground of a difference between the two provisions."

And again, we respectfully submit that a careful reading of that case would sustain the decision of this court in Harshman vs. Bates County. The Supreme Court in State vs. Sutterfield, 54 Mo., 396, uses the following language:

"There is no doubt that *in general* where an election is held to determine the choice of a candidate, or the determination of some question of public policy, the plurality required by law, whether it be a bare majority, or two-thirds or three-fourths, is determined by the result of the vote cast, without regard to the number of voters declining to vote, and this upon the ground that the failure to vote is assumed or may be presumed to be an acquiescence in whatever result may be produced by the act of those who feel sufficient interest in the election to go to the polls and vote; *and for the reason that, in most cases, there is no mode by which the absentees can be ascertained. The decision* of Lord Mansfield in Rex vs. Foxcraft, 2 Burr, 1017, is therefore rightly followed in many courts in this country, where it *might be properly applicable. But the decisions in England, or in the other states, are very unsafe guides where we are called upon to construe a con*

stitutional or statutory provision of our own state. If the language is plain and unambiguous, its requirements cannot be set at naught upon the strength of decisions elsewhere on statutes or constitutions essentially variant, or couched in very different terms."

And on page 397 id., the court says: "We are referred to two decisions of this court, (Bassett vs. the Mayor, etc., 37 Mo., 270, and the State vs. Binder, 38 Mo., 450) which are supposed to maintain views conflicting with this opinion. * * * *But a reference to these cases will show that neither of them arose upon the construction of a provision of the constitution, or upon the subject matter now under consideration."*

And further, upon page 378 id., the Supreme Co
"In none of these cases, however, was there any exa
of or construction given to the precise language of the constitutional provision now under consideration. THE TWO *cases last named were, upon temporary acts of the legislature, in which a construction, either way, was not of importance, as a subsequent legislature could readily do away with any inconvenience which might arise from incorrect or unacceptable constructions. The present case, however, suggests very different considerations."*

It would seem, therefore, that when it is borne in mind that State vs. Mayor, 37 Mo., *supra*, and State vs. Binder, 38 Mo., *supra*, and State vs. Winkelmeier, 35 Mo., *supra*, had no reference to any constitutional provision; and further, that they were construing statutes and elections thereunder prior to the carrying into effect of the state constitution and statute concerning the registration of voters, and especially the misconception of State vs. Sutterfield, 54 Mo., *supra*, and that inasmuch as these cases were made the reason of Cass County vs. Johnston, this court should, in the light of the recent decisions of the Supreme Court, in Webb vs. Lafayette County.

and State vs. Brassfield, 67 Mo., *supra*, restore the doctrine in Harshman vs. Bates County, *supra*, and declare this act, as the Supreme Court of Missouri does, to be unconstitutional and void, and the bonds issued thereunder of none effect.

ALEX. GRAVES,

Of Counsel for Defendant in Error.

No. .....

—*IN THE*—

Supreme Court of the United States,

OCTOBER TERM, 1879,

CHARLES E. ANTHONY,
Plaintiff in Error.
vs.
THE COUNTY OF JASPER.

In Error to the
Circuit Court of the United States
for the Western District
of Missouri.

Argument in Behalf of Defendant in Error,

PREPARED BY WILLIAM YOUNG, LEXINGTON, MO.

1879:
INTELLIGENCER NEWS, BOOK AND JOB POWER PRINT,
LEXINGTON, MO.

In the U. S. Supreme Court.

Argument in Behalf of Defendant in Error.

The only point sought to be made in this argument is, that in this case this court will follow the decisions of the Supreme Court of Missouri in the cases of State vs. Brassfield 67 Mo., 331, and Webb vs. Lafayette County, 67 Mo., 353.

In these cases it is decided that the act of the General Assembly of the State of Missouri, entitled "An act to facilitate the construction of railroads in the state of Missouri," approved March 23rd, 1868, recited in the bonds sued on as the authority for their issuance, is in conflict with sections 13 and 14, of article 11, of the constitution of the state, and the bonds therefore void.

We will discuss the question of the rulings of the court upon the 14th section first.

The decision of the state courts, in the two cases above recited, is that the act of the General Assembly, March 23rd, 1868, (Wagner's Statute, 1870, page 313 section 51,) which authorizes subscriptions to railroads upon two-thirds of the voters, voting at the election, voting in favor thereof, is in conflict with and prohibited by the 14th section of the 11th article of the constitution, which declares that the General Assembly shall not authorize such subscriptions, except two-thirds of the qualified voters assent thereto.

As to what would be the correct construction of this section, in connection with the statute, if it was now for the first time to be construed upon general principles of law, we will offer no suggestion.

In Harshman vs. Bates County, decided in this court at the October term, 1875, 2nd Otto, 569, this court's own construction was given to section 14, and the law of March 23rd, 1868, declared unconstitutional.

In County of Cass vs. Johnson, 5th Otto, 360, the former

decision was, by this court, overruled at the October term, 1877, citing the State vs. Linn County, 44 Mo., 504, and cases following as authority for so doing.

In State vs. Brassfield, 67 Mo., 331, and Webb vs. Lafayette County, 67 Mo., 353, decided at the April term of the Supreme Court of the state of Missouri, the state court held the act of the legislature unconstitutional as subversive of the said 14th section of the constitution, saying that the point there raised had never been passed upon by that court in any former decision.

These are the last expressions of the highest state judicial tribunal, and are unmistakable in their terms.

Will the court disregard the decision in County or Cass vs. Johnson, 5th Otto, 560, and follow the construction given by the state court to the state constitution, and its adjudication on a local law?

This very question was before the court at the present term, and was the only question considered by the court in Fairfield vs. County of Gallatin, 9 Cent., L. J., 467.

The opinion in that case is so comprehensive, and the doctrine so carefully and thoroughly discussed, that we will take it as the foundation of our argument, and because it is the latest utterance of the court on the point here made.

If it can be shown that the present case comes under the rule as expounded in that case, our task is done.

The conclusion of the court may be succinctly stated as follows: In cases depending upon the constitutionality of a statute of a state, the Supreme Court of the United States adopts the construction given it by the highest tribunals of the state, when that construction can be ascertained, and will reverse its own decision construing it when in conflict with the last decisions of the state court.

Of this rule the learned judge in delivering the opinion of the court says: "Undoubtedly some exceptions to it have been recognized. One of them is, that when the highest court of a state has given different constructions to its constitution and laws at different times, and rights have been acquired under the former construction, we have followed that and disregarded the latter."

This cannot be strained to imply that because a law has been attacked as unconstitutional on one ground, and is up-

held by the court on that point, and afterward declared unconstitutional on another ground, not noticed or advanced in the former case, that the former case will prevail. The true meaning is when the decisions are in direct conflict on the same point and rights acquired under the former, the course indicated will be followed. As a proof of which, immediately following the language quoted the opinion proceeds: "The present case is not within the exception, for there has been no *conflicting* interpretations by the state courts of the *section of the constitution* we are now called upon to construe."

A further and conclusive proof is the case of Boyd vs. Alabama, 4th Otto, 645, where the court says: "The fact that acts may, in this way, have been *often* before the court, is never deemed a reason for not subsequently considering their validity when the question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts because that point might have been raised and determined in the first instance."

We urge that there has been no conflict in the decisions of the state court on the point upon which the two last decisions of the state court (State vs. Brassfield, and Webb vs. Lafayette County) was based.

The state court in its decisions say that the point had never been passed upon by that court in any former decision. And in the opinion of this court, in County of Cass vs. Johnson, after citing all of the bond cases since the adoption of the constitution of 1865, Mr. Chief Justice Waite, who delivered the opinion of the court, says: "It is true that the objection now made to the law was in no case presented or considered."

The only case where the 14th section was ever referred to before the ones relied upon here as authority, is the case of the State vs. Linn County Court. It was not there construed, and was only incidentally spoken of. It was there contended that the act required the issuance of county bonds; that the bonds sought by the writ of *mandamus* would be county bonds when an election had only been held in a township, and that the said section 14 required a vote of the *county* before county bonds could be issued. There was not one word about the act making a rule different from that of

the constitution in determining the majority required. The court decided that the bonds sought in accordance with the form required in the act, would be township and not county bonds, and from the very fact of such decision, the use attempted to be made of the 14th section could not be made, and it passed out of the view of the court, and was never construed. So the state court decides, and this court, in County of Cass vs. Johnson, in the language above quoted, also decided. In no other case, cited as following the Linn County Court case, was the section ever referred to, and Judge Wagner, in that very case, by his language, shows conclusively that the construction of the section was not even thought of in reference to the act, when he says: "The new constitution has not abridged this power. It only requires a different mode of procedure, and that *two-thirds* of the *qualified voters* shall assent thereto, before any subscriptions shall be authorized to be made," 44 Mo., 511.

The language here used is the language of the constitution itself, and it is apparent that the provisions of the act with regard to the proportion of votes it required, was not in view.

The case of Rowan vs. Runnels, 5th Howard, 134, does not apply here, for the facts and circumstances on which that decision was based were substantialy different. That was upon a contract executed while there was no other decision on the points raised save that of Groves vs. Slaughter, 15 Peters, 449, decided by this court. It was decided in Groves vs. Slaughter that certain contracts were valid; and this stood as the only rule of construction given by any court at the time the contract before the court in Rowan vs. Runnels was executed. Subsequently to the execution of the contract the state court decided such contracts to be invalid, and this court in Rowan vs. Runnels adhered to its decision in Groves vs. Slaughter. The opinion in that case shows, from the language used, that such was the state of facts, and that it was so decided for the double reason that the contract was made while the decision of this court stood as the only judicial exposition of the law, which exposition the court was still of the opinion was the correct one on principle. That part of the opinion of Rowan vs. Runnels, quoted in Fairfield vs. Gallatin, shows that such were the facts and such the reason of

that decision, and is as follows: "Undoubtedly this court will always feel bound to respect the decisions of the state courts, and *from the time they are made* will regard them as conclusive in all cases upon the construction of their own constitution and laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court, were lawfully made."

The first part of the paragraph quoted shows that the contract had been executed before the decision of the state court was made, or else its decision would have been followed, and the latter part shows that it was executed while Groves vs. Slaughter was the only judicial interpretation of the law extant which had been decided on general principles, and which the court believed to have been correctly decided.

How essentially different the case here presented to the court: October term, 1875, Harshman vs. Bates County, this court decided on its own construction of the law and section of the constitution under consideration that the act of the legislature was unconstitutional and the bonds issued under it void, and this remained the rule of such property and of decision in all the courts of the state both federal and state for two years, and up until October term, 1877, when County of Cass vs. Johnson was decided overruling the former decision. At the April term, 1878, of the Missouri court, or six months after the decision in County of Cass vs. Johnson was rendered, the state court in the cases of State vs Brassfield, and Webb vs. Lafayette County decided the law unconstitutional, stating that it was done on points never before presented to that court for adjudication.

These pretended contracts had been executed long before any decision of any court on the constitutionality of the act of the legislature authorizing them to be issued.

Will deciding them to be void now be giving the decision of the state court a retroactive effect? No more so in principle than if they had been decided by the state court to be void long before the question had ever come before this court for adjudication, provided they had been issued before a decision had been made upon the point by any court at all.

The language used in the opinion in Rowan vs. Runnels

cannot be made applicable to the state of the law of this case as shown by the decisions of the courts, without making it cover every case where it is sought to invalidate a contract already executed, however, unauthorized by law.

It is said in Fairfield vs. County of Gallatin of the decision in Rowan vs. Runnels, that "The construction given by this court to the state constitution was adhered to in order to support a contract for slaves purchased, and apparently only for that reason."

But that cannot mean that this court has different rules of decisions on the same point, according to the effect the decision will have to sustain or defeat the action. Will not the court rather follow the rule irrespective of its effect on the cause of action, whether it supports it or whether it strikes it down?

To do otherwise would be to decide on which side the real merits of the case lie on the facts, and as in a case of this kind this court cannot try the merit, the decision of the case would turn upon a point on which the losing party is deprived of a hearing.

We beg the court not to conclude that the merits of this class of cases are against us. And as we are precluded from a trial upon the merits by the doctrine with regard to innocent purchasers, we ask for the full benefit of the law here invoked.

In the town of South Ottawa vs. Perkins, 4th Otto, 260. the decision of this court was, in substance, that: Except where the Federal constitution and laws are concerned, the courts of the United States, in passing upon the constitution and statutes of a state, conform to the construction of them by the highest state courts, and when the latter hold an act of the legislature void, the courts of the United States will hold likewise.

There was a dissenting opinion in that case, but not on that point, for upon that the court was unanimous. Mr. Chief Justice Waite for himself, and Mr. Justice Clifford, Mr. Justice Swayne and Mr. Justice Strong, in rendering the dissenting opinion says at the outset: "There is no doubt but that the construction which the courts of Illinois have uniformly given the constitution of the state, is binding upon us as a rule of decision. The difference between me and a majority of my brethren is as to the construction which has

been given, not as to its effect when ascertained. * * * Such a construction might and probably would be more logical; but our duty is to ascertain what has been done, and not what should have been;" and this was in the case of negotiable bonds of a municipal corporation, which had been on the market for over seven years when the decision was rendered.

May we not, then, conclude that the present case does not come under any of the exceptions noticed in Fairfield vs. County of Gallatin, and is entitled to the full benefit of the rule?

We cannot better conclude our discussion of the point urged, than by an extract from the opinion in the first case where the question came before this court for adjudication, Green vs. Neal's Lessee, 6 Peters, 291. "But the question is now raised whether this court will adhere to its own decision, made under the circumstances stated, or yield to that of the judicial tribunal of Tennessee. This point has never been before directly decided by this court on a question of general importance. * * * * On all questions arising under the constitution and laws of the Union, this court may exercise a revising power, and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions, and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different when a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court, but because, in the language of the court, in the case of Shelby et al vs. Guy, 11 Wheat. 361, 'a fixed and received construction by a state, in its own courts makes a part of the statute law.'

The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. A reference is here made, not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a state as great, in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case as well as in the other has the effect to establish, in the state, two rules of property.

Would not a change in the construction of a law of the United States, by this tribunal, be obligatory on the state courts? The statute, as last expounded, would be the law of the Union; and why may not the same effect be given to the

last exposition of a local law by the state court? The exposition forms a part of the local law, and is binding on all the people of the state, and its inferior judicial tribunals. It is emphatically the law of the state, which the federal court, while sitting within the state, and this court, when a case is brought before them, are called to enforce. If the rule, as settled, should prove inconvenient, or injurious to the public interests, the legislature of the state may modify the law, or repeal it.

If the construction of the highest judicial tribunal of a state form a part of the statute law, as much as an enactment of the legislature, how can this court make a distinction between them? There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply when the judicial branch of the state government, in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute, from what had at first been given to it. The charge of inconsistency might be made with more force and propriety against the federal tribunals for a disregard of this rule than by conforming to it. They profess to be bound by the local law, and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the state at the time the decision is made. This constitutes the rule of property within the state, by which the rights of the litigant parties must be determined.

As the federal tribunals profess to be governed by this rule, they can never act inconsistently by enforcing it. If they change their decision, it is because the rule on which that decision was founded has been changed."

We will now discuss the 13th section of article 11, of the State Constitution:

The question here presented is not will this court reverse its own decision and follow that of the state court, for the reason that this court has never, in any manner, construed this section. It has never even been referred to by this court. In Webb vs. Lafayette County, 67 Mo., 353, the Supreme Court of Missouri decided emphatically that the act of March 23d, 1868; authorizing the issuance of the bonds sued on was in conflict with said section 13, and bonds issued under it consequently void, and as this court has never construed said section, it will, in accordance with an unbroken line of decisions, now when the section is presented for construction, follow the decision of the state court, as upon this point it cannot be contended that there are any conflicting decisions in the state or any other court.

FILLMORE BEALL.